

(16,765.)

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 222.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

*vs.*

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, AND CHARLES ANDERSON EARLE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

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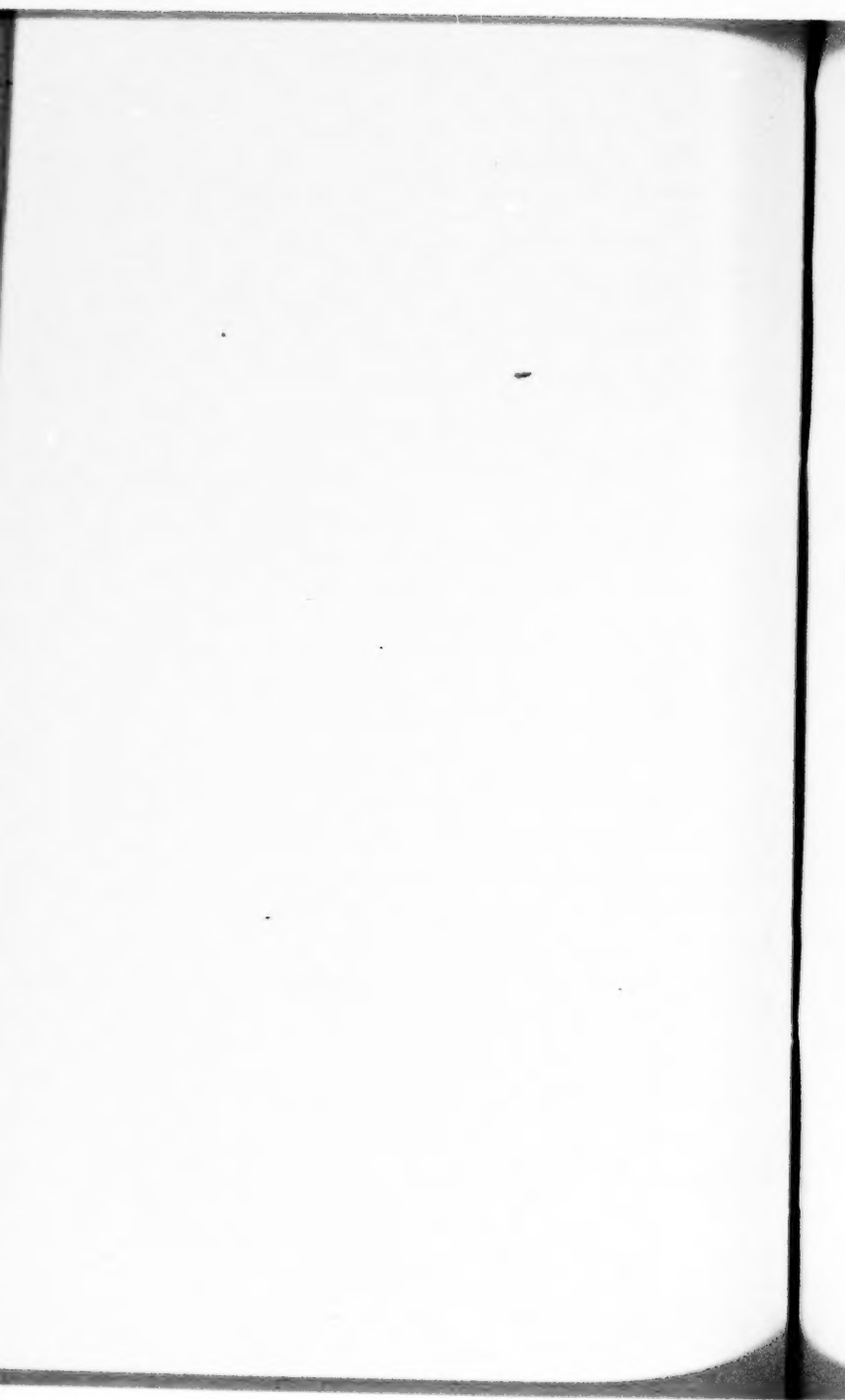
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1aa United States Circuit Court of Appeals for the Second Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, }  
 vs. }  
 JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDER- }  
 son Earle, Defendants in Error.

*Transcript of Record.*

Error to the circuit court of the United States for the southern district of New York.

1a UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between John Henry Clayton, Nicholas Roberts and Charles Anderson Earle, plaintiffs, and The Texas and Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as is said and appears by its complaint; we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States circuit court of appeals for the second circuit, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 19th day of August, 1897, that the record and proceedings aforesaid being inspected, the said judges of the United States circuit court of appeals for the second circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21st day of July, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-second.

2a

JOHN A. SHIELDS,

[L. s.] Clerk of the Circuit Court of the United States of  
 America for the Southern District of New York,  
 in the Second Circuit.

The foregoing writ is hereby allowed.  
 E. H. LACOMBE.

UNITED STATES OF AMERICA, }  
*Southern District of New York,* } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 3a to 165, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The Texas and Pacific Railway Company, plaintiff in error, against John Henry Clayton, Nicholas Roberts and Charles Anderson Earle, defendants in error, as the same remain- of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this ninth day of August, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-second.

JOHN A. SHIELDS, *Clerk.*

(Endorsed :) The U. S. circuit court of appeals for the second circuit. The Texas and Pacific Railway Company, plaintiffs in error vs. John Clayton *et al.*, defendants in error. Writ of error. Rush Taggart, attorney for plaintiff in error. Due service of a copy of the within writ of error is hereby admitted this 23rd day of July, 1897. Evarts, Choate & Beaman, attorneys for defendant- in error. U. S. circuit court. Filed Jul- 23, 1897. John A. Shields, clerk.

3a United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES AN-  
 derson Earle  
*against*  
 THE TEXAS AND PACIFIC RAILWAY COMPANY. }

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the city of New York, this 9th day of August, in the year one thousand eight hundred and ninety-five.

[L. s.]

JOHN A. SHIELDS, *Clerk.*

EVARTS, CHOATE & BEAMAN,

*Plaintiffs' Attorneys.*

Office and post-office address, No. 52 Wall street, New York city.

4a United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON EARLE  
*against*

THE TEXAS AND PACIFIC RAILWAY COMPANY.

The plaintiffs herein, by Evarts, Choate & Beaman, their attorneys, complain of the defendant, The Texas and Pacific Railway Company, and allege, upon information and belief, as follows:

First. At all the times hereinafter mentioned, the plaintiffs were and are now partners doing business as cotton merchants in the city of Liverpool, England, under the firm name of Newall & Clayton, and are subjects of the Queen of Great Britain and Ireland.

Second. At all the said times the defendant was and now is a railroad corporation duly created and existing under and by virtue of an act of Congress of the United States of America, approved March 3, 1871, and was and is now engaged in conducting the business of a common carrier of merchandise for hire from various places in the State of Texas to Westwego, in the State of Louisiana, and was and is an inhabitant of the southern district of New York.

Third. Heretofore, and in the month of October, 1894, at 5a Bonham, in the State of Texas, the plaintiffs delivered to the said defendant as such common carrier 500 bales of cotton, weighing 264,827 pounds, and the defendant then and there received the same and then and there undertook and agreed, as a common carrier as aforesaid, to carry the same, safely and securely, at a through price or rate of freight from the said place of shipment to Liverpool, England, by way of New Orleans, and thence to Liverpool, England, by the Elder, Dempster & Co.'s line of steamships, and there to deliver the same to the plaintiffs upon the payment of freight therefor.

Fourth. The said defendant has failed to keep its said agreements and to carry safely 467 of said bales of cotton to Liverpool, aforesaid, and there deliver the same to the plaintiffs, although the plaintiffs have duly demanded delivery thereof, and although they have been at all times ready and willing to pay the said freight for such carriage; and, through the negligence and carelessness of the defendant and without the fault of the plaintiffs, 467 bales of said bales of cotton, weighing upwards of 247,349 pounds, and of the value of seventeen thousand three hundred and fourteen and  $\frac{3}{100}$  dollars, were, on or about the twelfth day of November, 1894, wholly destroyed by fire at Westwego, in the State of Louisiana aforesaid, at which time and place the same were in the possession of the defendant in the course of such carriage and as a common carrier as aforesaid. The bales so destroyed were marked as follows:

130 bales marked T C U P, 77 bales marked O X F O, 38 bales marked S A B O, 42 bales marked J A X O, 38 bales marked C A R L, 54 bales marked O A T S, 66 bales marked J P A N, and 22 bales marked Q B E E.

6a Fifth. The plaintiffs have duly demanded the payment to them by the defendant of the said value of the said 467 bales of cotton thus destroyed, and have duly performed all the acts necessary for them to do under and by virtue of said agreements, but the defendant has refused to pay the plaintiffs the value of the bales of cotton destroyed, as aforesaid, or any part thereof, although the defendant has admitted that said bales of cotton were destroyed by fire at Westwego aforesaid.

Wherefore, the plaintiffs demand judgment against the defendant for the sum of seventeen thousand three hundred and fourteen and  $\frac{43}{100}$  dollars, with interest thereon from the 12th day of November, 1894, besides the costs of this action.

EVARTS, CHOATE & BEAMAN,  
*Attorneys for the Plaintiffs, No. 52 Wall Street,  
New York City, New York.*

SOUTHERN DISTRICT OF NEW YORK, }  
City and County of New York, } ss:

I, Treadwell Cleveland, being duly sworn, depose and say as follows: I am one of the attorneys and of counsel for the plaintiffs in the above-entitled action, and have read the foregoing complaint and know the contents thereof; the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true. The grounds of my belief as to all the matters in said complaint not stated upon my knowledge are as follows, namely, the possession of the original documents relating to the shipment and value of the cotton and communications received from the defendant and others in relation to its destruction.

7a The reason why this verification is not made by the plaintiffs is that the plaintiffs do not reside and are not within the city and county of New York, where the plaintiffs' attorneys reside or have their office.

TREADWELL CLEVELAND.

Sworn to before me this 9th day of August, 1895

[L. s.]

MARVELLE C. WEBBER,  
*Notary Public, New York County.*

(Endorsed:) United States circuit court, southern district of New York. John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle against The Texas and Pacific Railway Company. Summons and complaint. Evarts, Choate and Beaman, No. 52 Wall street, New York city, attorneys for the plaintiffs. I hereby certify that on the 16th day of August, 1895, at the city of New York, in my district, I personally served the within summons and complaint upon the within-named The Texas and Pacific Railway Company by exhibiting to Charles E. Satterlee, secretary of said company, the within original, and at the same time leaving with him a copy of each thereof. John H. McCarty, United States marshal, southern district of New York. Dated Aug. 22, 1895. U. S. circuit court. Filed Dec. 4, 1895. John A. Shields, clerk.

8a United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON Earle, Plaintiffs,  
against  
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant. }

The above-named defendant, by Rush Taggart, its attorney (protesting, however, that the court is without jurisdiction for the reason that the defendant is not an inhabitant of the southern district of New York and not consenting to the said jurisdiction), answers the complaint herein as follows:

First. Said defendant has no knowledge or information sufficient to form a belief as to any or either of the allegations contained in the paragraph or subdivision of said complaint designated first.

Second. The said defendant admits the allegations contained in the paragraph or subdivision of said complaint designated second, save and excepting the allegations that the defendant was and is an inhabitant of the southern district of New York, which said allegation defendant denies.

Third. Said defendant admits that heretofore and in the month of October, 1894, at Bonham, in the State of Texas, there was delivered to the defendant by the plaintiff certain cotton, being the number of bales specified in the paragraph or subdivision of said complaint designated third and destined as therein stated, but that defendant has no knowledge or information sufficient to form a belief as to the weight of said cotton, and the defendant denies each and every other allegation contained in the said paragraph or subdivision of said complaint.

Fourth. Said defendant admits that 467 bales of said cotton, marked as described in the paragraph or subdivision of the said complaint designated fourth, were destroyed by fire at Westwego, in the State of Louisiana, on or about the 12th day of November, 1894; but the defendant denies each and every other allegation in the said paragraph or subdivision contained.

Fifth. Said defendant admits the allegation contained in the paragraph or subdivision of said complaint designated fifth, to the effect that it has refused to pay the plaintiff the value of the cotton destroyed as aforesaid, although admitting that it was destroyed by fire at Westwego; but said defendant denies each and every other allegation in the said fifth paragraph or subdivision contained.

Wherefore, the defendant demands that said complaint may be dismissed, with costs.

RUSH TAGGART,  
*Attorney for the Defendants,*  
No. 195 Broadway, New York, N. Y.

SOUTHERN DISTRICT OF NEW YORK, }  
City and County of New York, } ss:

Charles E. Satterlee, being duly sworn, says: That he is an officer of the defendant above named, The Texas and Pacific Railway

Company, to wit, the treasurer thereof; that he has read the  
 10a foregoing answer and knows the contents thereof; that the  
 same is true, excepting as to the matters therein stated to be  
 alleged on information and belief, and as to those matters he believes  
 it to be true.

C. E. SATTERLEE.

Sworn to before me this 18th day of November, 1895.

B. W. J. FOX,  
*Notary Public, Kings Co., N. Y.*

Certificate filed in New York county. —

(Endorsed:) United States circuit court, southern district of  
 New York. John Henry Clayton, Nicholas Roberts, and Charles  
 Anderson Earle, plaintiffs, *vs.* The Texas and Pacific Railway Com-  
 pany, defendant. Answer. Rush Taggart, attorney for defendant,  
 195 Broadway, New York. U. S. circuit court. Filed Nov. 19,  
 1895. John A. Shields, clerk.

At a stated term of the circuit court of the United States of  
 America, for the southern district of New York, in the second cir-  
 cuit, held at the United States court-rooms, in the city of New York,  
 on Friday, the ninth day of April, in the year of our Lord one  
 thousand eight hundred and ninety-seven.

Present: The Honorable E. Henry Lacombe, circuit judge.

JOHN HENRY CLAYTON ET AL.  
*vs.*  
 TEXAS AND PACIFIC RAILWAY COMPANY. }

Now come the plaintiffs, by Treadwell Cleveland, Esq.,  
 11a their attorney, and move the trial of this cause. Likewise  
 comes the defendant, by Rush Taggart, Esq., its attorney.  
 Thereupon a jury is impaneled and the cause proceeds to trial.  
 After hearing the evidence for the respective parties and the argu-  
 ment of counsel, the jury on the 14th day of April, 1897, by direc-  
 tion of the court say that they find a verdict for the plaintiff for the  
 sum of fourteen thousand and sixty-eight dollars (\$14,068), and so  
 say they all.

Thereupon the court grants the defendant a stay of 60 days after  
 entry of judgment within which to make and serve a case, with leave  
 to turn the same into a bill of exceptions.

(An extract from the minutes.)

JOHN A. SHIELDS, *Clerk.*

JOHN HENRY CLAYTON ET AL.

United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON EARLE  
*against*  
 THE TEXAS AND PACIFIC RAILWAY COMPANY.

*Judgment, Dated April 22, 1897.*

The issues in this action having on April 12, 1897, duly come on to be tried before Honorable E. Henry Lacombe, United States circuit judge, and a jury, and the trial thereof having duly proceeded on the said twelfth day of April, 1897, and the days subsequent thereto, and the jury having on the fourteenth day of April, 1897, by direction of the court, duly rendered a verdict in favor of the plaintiffs against the defendant for the sum of fourteen thousand and sixty-eight dollars, and the plaintiffs' costs and disbursements herein having been duly adjusted in the sum in that behalf hereinafter mentioned:

Now, on motion of Evarts, Choate & Beaman, attorneys for the plaintiffs,

It is ordered and adjudged, that the plaintiffs, John Henry Clayton, Nicholas Roberts and Charles Anderson Earle, recover from the defendant, The Texas and Pacific Railway Company, the sum of fourteen thousand and sixty-eight dollars, the amount of said verdict, and the further sum of seven hundred and thirteen and  $\frac{55}{100}$  dollars, the plaintiffs' cost and disbursements as adjusted, amounting in all to the sum of fourteen thousand seven hundred and eighty-one  $\frac{55}{100}$  dollars (\$14,781.55), and that the plaintiffs have execution against the defendant therefor.

Judgment signed and entered this 22d day of April, 1897,

JOHN A. SHIELDS, *Clerk.*

(Endorsed :) United States circuit court, southern district of New York. John Henry Clayton, Nicholas Roberts, & Charles Anderson Earle against The Texas & Pacific Railway Company. Judgment, dated April 22, 1897. Evarts, Choate & Beaman, 52 Wall street, New York city, attorneys for plaintiffs. U. S. circuit court. Filed Apr. 22, 1897, 12.29 p. m. John A. Shields, clerk.

1 United States Circuit Court for the Southern District of New York.

JOHN CLAYTON ET AL.  
*against*  
 THE TEXAS AND PACIFIC RAILWAY COMPANY.

*Bill of Exceptions.*

Be it remembered that at a regular term of this court held on the first Monday of April, 1897, to wit, on the 9th day of April, 1897, the issues in this cause came on for trial before the Hon. E. Henry Lacombe, circuit judge, and a jury duly impaneled and sworn, and



thereupon the plaintiff, through *his* counsel, having opened *his* case to the jury to maintain the issues on *his* part, called as a witness MARVELLE C. WEBBER, who testified as follows:

By Mr. CLEVELAND:

Q. You are a lawyer and an assistant of the attorneys for the plaintiffs?

A. I am.

Q. Are you familiar with the details connected with the institution of this suit and the motion and plea to the jurisdiction made by the defendant?

A. I am.

Q. Will you please state the incidents connected with the institution of this suit and what steps were taken by the defendant before the motion to the jurisdiction was made?

A. The summons and complaint was served on Charles E. Satterlee, secretary and treasurer of the defendant, at No. 195 Broadway, New York city, on August 16, 1895. On August 16, 1895, the plaintiffs' attorneys received from Winslow S. Pierce, Esq., an attorney and counsellor at law, with offices at 195 Broadway, in the city of New York, a letter, which reads as follows:

"The Texas and Pacific Railway Company, legal department.

"John F. Dillon, general counsel. Winslow S. Pierce, general attorney.

"195 BROADWAY, NEW YORK, August 16, 1895.

"Messrs. Evarts, Choate & Beaman, 52 Wall street, N. Y. city.

"GENTLEMEN: Will you have the kindness to let me have two additional copies of the complaint in each of the following cases, namely: John Henry Clayton and others *vs.* The Texas and Pacific Railway Company, and Arthur Bower Forwood *vs.* The Texas and Pacific Railway Co., and very much oblige,

"Yours very truly,

"WINSLOW S. PIERCE."

We were informed by the representative of Mr. Pierce's office that these extra copies were necessary to be sent to the southern offices of the company to obtain the information required for preparing the answers. Extra copies were furnished as requested. On or about September 3, 1895, Mr. Pierce applied for an extension of time to answer, demur or otherwise move in this action. The stipulation was prepared by his office and contained the full title of the said action and was enclosed in a cover endorsed: "U. S. circuit court, southern district of New York. Def't stipulation extending def't's time to answer, &c. Winslow S. Pierce, att'y for def't, 195 Broadway, N. Y.; John F. Dillon, counsel."

We were unwilling at first to grant such extension, but finally did so on the express understanding that the said answer should be served in sufficient time to allow the said action to be noticed for



trial for the October term. The reason why this condition was not written into the stipulation was because Mr. Pierce was absent, and his representative, Mr. Duncan, said he did not like to change the form of the stipulation as prepared by him, but gave assurances that said condition would be complied with. We heard nothing contrary to said understanding until an application was made to us on or about September 28 by Mr. Taggart for a further extension of time. We were informed that Mr. Taggart had been retained to defend the suits. We refused to grant such an extension of time. Thereupon Mr. Taggart applied to Judge Benedict, on an affidavit entitled in said action stating that he was the attorney of the defendant therein, for an order extending the time to answer, plead, demur or otherwise move, thirty days from September 30, 1895. The said motion papers were enclosed in a cover endorsed, "U. S. circuit court. William H. Cornforth and Beaumont Taylor and other cases (of which the Clayton case was one), plaintiffs, against The Texas and Pacific Railway Co., defendant. Rush Taggart, attorney for defendant, 195 Broadway, N. Y.; John F. Dillon, counsel."

The moving affidavit stated that the said attorney was ready and prepared to serve a motion to set aside the service of the summons and complaint and except to the jurisdiction of the court over the defendant on the ground that it is not an inhabitant of this district, and that the plaintiffs are either aliens or inhabitants of other than this district. The said attorney further stated in said affidavit that

4 he desired such an extension of time in order to enable the said motion to be submitted to the court and decided, and because, if required to answer, the defendant would need that time to obtain information as to the facts in the States of Texas and Louisiana.

Instead of making such motion at once, the defendant's attorney waited until the extension of time to plead granted by us was about to expire and then applied for further time, and, being refused, applied to the court and obtained an extension of time beyond the date on which notices of trial for the October term were required to be served. On such application Judge Benedict granted an extension of time for ten days from September 30, 1895. The motion papers to set aside the service of said summons and complaint were not served until late in the afternoon of October 4th, 1895, four days after the date of the application for said order.

Q. Have you examined the acts of Congress by which the defendant was incorporated?

A. I have.

Q. Please state the provisions of said act.

A. The Texas and Pacific Railway Company, the defendant, was incorporated by an act of Congress approved March 3, 1871, (Statutes at Large, vol. 16, p. 573.) Such act provides that certain persons, set forth in the said act, "and all such persons as shall or may be associated with them and their successors, are hereby created a body politic and corporate in fact and in law by the name, style and title of the Texas and Pacific Railroad Company, and by that

name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity within the United States, and may make and use a common seal, and said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, county of Harrison, State of Texas," to certain other points or places in Texas, New Mexico, Arizona and California.

Section 2 provides that the persons named in the first section of the act should constitute a board of commissioners to be known as the Texas and Pacific railroad commissioners, who should meet in the city of New York within ninety days after the passage of the act at a time to be designated in a notice to be published for two weeks in at least one daily newspaper in New York, New Orleans and Washington, for the purpose of organizing such company. It was further provided that the annual meetings of stockholders should take place as provided for in the by-laws.

Q. Where are the annual meetings of the stockholders, the annual meetings of the directors, and the meetings of the executive committee of the defendant held?

A. The annual meeting of the stockholders, the annual meeting of the board of directors, and the meetings of the executive committee of the board are held in the city of New York.

Q. You may continue, Mr. Webber.

A. Section 3 of the act of incorporation provides for fixing the amount of the capital stock, and when so fixed that it should never be increased except by consent of Congress, and that assessments upon such stock should only be made by a majority vote of the whole number of directors at a regular meeting, and such assessment should be paid at the expiration of thirty days after a notice given in one newspaper in each of the cities of Washington, Philadelphia, New York, and New Orleans.

Section 13 provides that the president of the company shall annually, by the first of July, make a report and file it with the Secretary of the Interior, which report shall be in writing, submitting the financial situation of the company, the amount of money received and expended and the number of miles of road constructed in each year, the name and residences of the stockholders and of the directors and other officers of the company, the amount of stock subscribed and the amount annually paid in, and a description of the lines of road surveyed and fixed upon for construction; the amount received from passengers; statement of expenses of said road and its fixtures and a true statement of the indebtedness of said company and the various kinds thereof.

Section 17 provides that certain parts of the lines should be constructed within certain periods of time, and upon failure to so complete it Congress might adopt such measures as it should deem necessary and proper to secure a speedy completion.

Section 19 declares the railroad to be a military and post road.

This act was amended by an act of Congress approved May 2,

1872. By that act the name of the company was changed to "The Texas and Pacific Railway Company."

Q. Was the defendant incorporated under the laws of Texas?

A. The defendant was never incorporated by the laws of the State of Texas, and by the laws of such State was granted only certain rights and privileges; but in all of said laws the legislature expressly recognized, and so recites in the acts, that the said railway company is a corporation created by the laws of the Congress of the United States.

The first act is that of 1871, chapter 272, passed May 24, 1871, entitled "An act to encourage the speedy construction of a railway through the State of Texas to the Pacific ocean."

This act recites that the State of Texas had theretofore incorporated three different companies with power to construct a railway from the eastern boundary of the State to El Paso on the Rio Grande, viz., the Southern Pacific Railroad Co., the Memphis, El Paso and Pacific Railroad Co., and the Southern Trans-Continental Railway

Co.; and enacts (section 1) that the State of Texas binds  
7 itself to donate to the Southern Pacific Railroad Co. and the Southern Trans-Continental Railway Co., heretofore chartered by the State of Texas, bonds of the State of Texas to the amount of \$6,000,000, on certain specified conditions being complied with for the purpose of completing a line of railroad to the Pacific ocean.

Section 11 provides that all the rights, benefits and privileges granted and intended to be secured by this act of the Southern Pacific Railroad Company and to the Southern Trans-Continental Railway Company should pass to and vest in the Texas and Pacific Railway Company, recited to be "a corporation created by and under the laws of the United States by an act of Congress approved March 3, A. D. 1871," whenever said Southern Pacific Railroad Company and said Southern Trans Continental Railway Company should become consolidated with the said Texas and Pacific Railroad Company; and authority was thereby given to the said Southern Pacific Railroad Company and the said Southern Trans-Continental Railway Company and the said Texas and Pacific Railroad Company to consolidate on such lawful terms and conditions as might be agreed upon between the said companies.

The next act is that of November 25, 1871, chapter 82, being an act amendatory of and supplemental to the above act. It empowers (sec. 5) the Southern Pacific Railroad Company and the Southern Trans Continental Railway Company to conform the gauge of their several roads to such gauge as may be adopted by the Texas and Pacific Railroad Company, recited to have been chartered "under act of the Congress of the United States, March 3, 1871."

The act, chapter 108, Special Laws, 1873, after reciting the authority theretofore given to the Southern Trans-Continental Railway Company and the Southern Pacific R. R. Co. to become consolidated with the Texas and Pacific Railroad Company, stated in said act to be "an incorporation created by an act of Congress of the United States," and that such consolidation had been

8 effected, and that in order to avoid a future difference of opinion as to the amount of lands to which the said Texas

and Pacific Railroad Co. might be entitled by reason of such consolidation, as the assignee and successor of the said Southern Pacific R. R. Co. and the Southern Trans-Continental Railway Co. enacts (section 1) "that the Texas and Pacific Railway Company, a corporation created by an act of Congress of the United States as the successor of the Southern Trans-Continental R. R. Co." \* \* \* and "of the Southern Pacific Railway Co." should construct its road to certain places within a certain time.

Section 2 granted lands to the Texas and Pacific Railway Company.

Section 9 provided that the grants, donations, reservations were made "to the said Texas and Pacific Railway Co., a corporation created by an act of the Congress of the United States, approved March 3, 1871, as the assignee and successor of the Southern Trans-Continental and Southern Pacific R. R. Co.," with the intent that they should be in full satisfaction of claims under the said acts of May 24, 1871, and November 25, 1871, and further provided that the said Texas and Pacific Railway Company should be subject to such general laws as might be enacted by the legislature applicable to other railroads constructed within the State of Texas.

Q. Have you examined the annual reports of the defendant?

A. I have obtained a copy of the annual report of the defendant for the year ending December 31, 1894, from the Secretary of the Interior of the United States.

Q. State what you found in the report for that year.

A. The report begins as follows:

"OFFICE TEXAS AND PACIFIC RAILWAY COMPANY,  
"NEW YORK, *March 1st, 1894.*

"To the stockholders of the Texas and Pacific Railway Co.:

"The following report of the operations of the Texas and Pacific Railway Company for the fiscal year ending December 31st, 1894, is respectfully submitted by your board of directors:"

It appears by such report that the interest on the bonds of said company amounted to \$1,279,490 for the year 1894. At page 47 of said report is a statement of the general expenses of the Texas and Pacific Railway Company for the year 1894. This statement contains an item as follows:

"Expense—New York office, \$17,607.38."

On page 3 of said report is a list of the officers and directors of the said company.

The directors elected March 20, 1895, are given as follows:

"Sam'l Sloan, New York.

"R. M. Galloway, New York.

"John T. Terry, New York.

"Samuel Thomas, New York.

"Russell Sage, New York.

"George J. Gould, New York.

"Thomas T. Eckert, New York.

- " John G. Moore, New York.
- " C. M. McGhee, New York.
- " Isaac J. Wister, Philadelphia.
- " J. N. Hutchinson, Philadelphia.
- " John P. Munn, New York.
- " Milton H. Smith, Louisville.
- " S. H. H. Clarke, St. Louis.
- " A. L. Hopkins, New York.
- " Howard Gould, New York.
- " C. E. Satterlee, New York."

The following is a partial list of the officers as given in said report:

- " George J. Gould, president.
- " S. H. H. Clark, vice-president.
- " C. E. Satterlee, secretary and treasurer.
- " L. S. Thorne, third vice-president and general manager.

\* \* \* \* \*

- 10 " John F. Dillon, general counsel, New York.  
 " Winslow S. Pierce, general attorney, New York."

It appears by the said report that the annual meeting of the said company is held on the third Wednesday in March in the city of New York; that the registrar of stock is the Mercantile Trust Company of New York city; the trustees of bonds, the Fidelity Insurance, Trust and Safe Deposit Company of Philadelphia, Penn., and the Mercantile Trust Company of the city of New York. The directors elected March 20, 1895, were as follows: Samuel Sloan, R. M. Galloway, John T. Terry, Samuel Thomas, George J. Gould, Thomas T. Eckert, Russell Sage, C. M. McGhee, C. E. Satterlee, A. L. Hopkins, John G. Moore, Howard Gould, John P. Munn, all residing in New York city, N. Y.; Isaac J. Wistar, J. N. Hutchinson, residing in Philadelphia, Pa.; Milton H. Smith, Louisville, Ky.; S. H. H. Clark, residing in St. Louis, Mo. The president of said company is George J. Gould, who resides in the city of New York; the vice-president is S. H. H. Clark, who resides in St. Louis, Mo., and the secretary and treasurer is C. E. Satterlee, who resides in the city of New York, N. Y. The interest on the first-mortgage bonds is payable in New York city at the Mercantile Trust Company and also in Philadelphia. The interest on the second-mortgage bonds is also payable in the city of New York. On page 4 of the said annual report it is stated that the first-mortgage bonds amount to \$25,000,000 and the second-mortgage bonds to the same amount, the whole amount of the bonded debt being \$50,000,000, all the principal whereof is, I believe, payable at the city of New York.

Q. Have you examined Poor's Manual of Railroads for statements concerning the defendant?

A. I have. The following facts appear in Poor's Manual of Railroads for the years hereinafter mentioned:

The only office of the said Texas and Pacific Railway Company in the years 1871, 1872, 1873, 1874 and 1875 was in the city of New York.

11 In 1876 its principal office was in Marshall, Texas, and its executive office in Philadelphia.

In 1877 and 1878 its general office was in said Marshall, Texas; its executive office in Philadelphia and its transfer agency in the city of New York.

In 1879 its principal office was in Marshall and the executive office in Philadelphia.

In 1880 and 1881 its general office was in Philadelphia, its principal office in Marshall and the transfer agency in the city of New York.

In 1882, 1883 and 1884 its general office was at 195 Broadway in the city of New York, the same place where it now has its New York office, and its principal office in St. Louis.

In 1885 its general office was at 195 Broadway in the city of New York, and its executive office in St. Louis.

In 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893 and 1894 its general office was at 195 Broadway in the city of New York, and its executive offices in Dallas, Texas.

Q. Have you read the resolution adopted in the city of New York on July 15, 1889, by the executive committee of the board of directors of the defendant, in reference to the act of the legislature of Texas requiring railroad companies to maintain their general offices in that State, and, if so, state what you know about it?

A. It sets forth that, while it was the purpose of the company to comply with that law in letter and spirit, nevertheless this was done "without waiving any of its chartered or legal rights in the premises," and "out of respect to the legislative expression of the State of Texas."

Q. Do you know whether the annual meeting of the stockholders and of the board of directors, as well as the meetings of the executive committee, have ever been held in the State of Texas?

12 A. They have not, but have been held during the greater period of the existence of the defendant, where they are held now, in the city of New York.

WILLIAM R. MONTGOMERY, a witness in behalf of plaintiffs, having been duly sworn, testified:

By Mr. CLEVELAND:

Q. Are you employed by the plaintiffs' attorneys?

A. I am.

Q. Have you ever been in the New York offices of the Texas and Pacific Railway Company, and, if so, state what you observed there.

A. On or about the 9th day of October, 1895, I went to No. 321 Broadway, in the city of New York, where the Texas and Pacific Railway Company maintains a freight agency. There is a sign over the doorway at said place with the inscription "Texas and Pacific railway," and a similar inscription appears on the window fronting on Broadway. I entered said office and inquired for the freight agent of the Texas and Pacific Railway Company and was



referred to a person sitting at a desk in the office, to whom I applied and asked if that was the freight agency of the Texas and Pacific Railway Company. He replied that it was. I saw a sign over a doorway leading into an inner room of the office bearing the inscription, "general passenger agent, Texas and Pacific." I inquired if the company shipped freight from this city to points in Texas and the agent replied that it did. I have been several times in the office of the Texas and Pacific Railway Company at No. 195 Broadway in the city of New York. There is a sign in the hallway in front of the door bearing the inscription, "Texas Pacific Railway Co." The door bears the inscription, "Texas and Pacific Railway Co., transfer office." I saw at least two large rooms which were occupied by the said company. One of the rooms is divided by a partition similar to those used in banks for separating the public from its officers and employees. Behind this partition were 13 several desks. An opening, or window in said partition, allowing communication with a person stationed there, bore the inscription, "cashier." The other office was occupied by Mr. Charles E. Slatterlee, the secretary and treasurer of said company. I served the said treasurer with summons and complaint in this action.

JOHN D. KERNAN, a witness in behalf of plaintiffs, being duly sworn, testified:

By Mr. CLEVELAND:

Q. You are a lawyer, Mr. Kernan?

A. I am.

Q. Were you at one time counsel for the Interstate Commerce Commission in an action against the Texas and Pacific Railway Company?

A. I was.

Q. Please state what contention was made in that action by the railway company.

A. It was claimed by the Texas and Pacific Railway Company that the court did not have jurisdiction over it in the action on the ground that the principal office was not within the southern district of New York.

Q. What answer did you make to that?

A. I filed an affidavit stating facts to show that its principal office was within this district.

Q. Will you please state what facts you know upon that point?

A. The United States Statutes incorporating the road (16 Stat. at Large, p. 574, &c., and 17 do., p. 59) have no provision as to where the principal office shall be, and provides that the first meeting to organize, &c., shall be held in New York city. The New York office is the place where the annual meeting of stockholders for the election of directors is, and for many years past, has been held; said meetings are held bi-annually; at the election there held by stockholders for the purpose aforesaid, in March, 1889, and at the meet-

ing of stockholders so held in March, 1891, there were elected  
 14 as directors of the company for two years, fifteen directors,  
 ten of whom were at all times residents of the city of New  
 York. Substantially all of the meetings of the board of directors  
 for the transaction of the business relating to the company are held  
 at its office in the city of New York. In the absence of the board  
 of directors powers of the board are, under the by-laws of the com-  
 pany, vested in an executive committee of five members all of whom  
 are directors residing in the city of New York, as aforesaid, and the  
 meetings of said executive committee are held, as aforesaid, at the  
 office of the company in the city of New York; that no meeting of  
 the stockholders or of the board of directors or of the executive  
 committee are held in Texas except the biennial stockholders' meet-  
 ing, where directors are elected, in the city of New York, is adjourned  
 to meet in Texas; that said adjourned meeting in Texas is merely  
 formal and no business of consequence is done thereat. Only one  
 meeting of the board of directors was held in Texas in 1891, and  
 that was an adjourned meeting held at the same time that the ad-  
 journed stockholders' meeting was held. No stockholders, substan-  
 tially, were present at said adjourned meeting in Texas, except by  
 proxy, and no majority or quorum of the board of directors was  
 present. During the two years 1890 and 1891 no meeting of the  
 board of directors or of the executive committee was held in Texas  
 or otherwise than at the New York office, where the majority of the  
 board or of the executive committee were present or transacted  
 business. The object of holding an adjourned meeting of stock-  
 holders and of the board of the directors in Texas, as aforesaid, is to  
 comply with the statutes of Texas, which require the board to meet  
 in such State at least once a year, &c.

Sayles' Texas Civ. St., sec. 4115.

During the time that the executive office of the company was at  
 Philadelphia, Pennsylvania, Thomas A. Scott of Philadelphia,  
 Pennsylvania, was president of the company. During the  
 15 time that the principal office of address was at St. Louis the  
 first, second and third vice-presidents of the company all re-  
 sided there. Since 1887 the president and first vice-president has  
 resided in New York, and have had their office at said 195 Broadway.  
 It is to be observed that a distinction between the general or princi-  
 pal office (singular) and the general or executive offices (plural) has  
 always been observed. The said New York office in 1892 was the  
 office of Jay Gould, president, of George J. Gould, first vice-president,  
 and of C. E. Satterlee, the secretary and treasurer of the company;  
 the annual reports of the condition and operations of the company  
 are prepared at said New York office, and there dated and issued to  
 the stockholders under the hand of the president of the company.  
 The statement in said reports for 1888, 1889 and 1890, as to the of-  
 fices of the company, is as follows:

"General offices, Dallas, Texas; New York office, 195 Broadway,  
 N. Y."

The books of minutes of both stockholders' and directors' meetings



are kept by the secretary and treasurer of the company at the said New York office, and all certificates of stock are there issued. Weekly reports of the receipts and disbursements are sent to the secretary and treasurer at the said New York office, and there kept by him in appropriate books. In addition thereto, monthly reports thereof are sent to the president at the said New York office. It is true that the general or executive offices of the company are at Dallas, Texas. At such offices the orders and directions of the president, and in his absence the first vice-president, and of the board of directors and the executive committee of the company, are carried out by the different executive departments there located, and the books relating to such operations so carried out are there kept, such offices being, in a word, the offices of the different executive departments charged with the duty of carrying on operations of the road subject to the direction and control of the president, first vice-president, board of  
 16 directors and executive committee, located in the city of New York. The act of the Texas legislature of March 27, 1889, requiring railroads to keep and maintain their general offices, shops, &c., within the State of Texas, on its line, and to keep there certain officers, to wit; president or vice-president, &c., or some one to perform the duties thereof—obviously used the words “general offices” in the sense of executive offices, as aforesaid.

In pursuance thereof, the defendant, under the resolution contained in the moving affidavit, put into the office of third vice-president John A. Grant, theretofore and since the general manager of the company, located at Dallas, Texas. An assistant secretary and treasurer was also appointed and has since so acted at Dallas, Texas. No other changes were made or had taken place up to the time I made my affidavit in March, 1892, in the interstate commerce case, in reference to the offices of the company under the said act of March 27, 1889. All of the other executive agents of the company, as auditor, &c., had long prior thereto been, as is usual and necessary, located in Texas, where the plant of the company is situated and operated.

The foregoing facts were stated by me in the said affidavit on information and belief and were derived from the statutes of the United States and Texas, from the printed reports issued to stockholders by the president as aforesaid, and from an interview held with Mr. Satterlee, the secretary and treasurer of the company, at which the counsel of the company was present. At the same interview Mr. Satterlee admitted that Poor's Manual is a leading authority for information as to railroad facts and statistics published in the United States. In the report for 1891 it is stated as follows: “Executive offices, Dallas, Texas; general office, 195 Broadway, N. Y.” The said reports are based upon information furnished to those who issue said manual by the railroads themselves, either in the form of blanks  
 17 or taken from the annual reports made to stockholders by the presidents of such companies. At the said New York office the said Poor's Manual is subscribed for and taken by the company. At said interview with the secretary and treasurer of

the company—Mr. Satterlee—I called his attention to the statement made in Poor's Manual for 1891, and in reply thereto Mr. Satterlee said that he had but recently noticed that statement contained in Poor's Manual for 1891, and that it was wrong and a mistake, and that he could not understand how it had occurred. Upon inquiry at the office of Poor's Manual I was advised that they had followed since 1888 their publication as to the question of offices issued prior to 1888; also that in one report only made by the company since 1883, had it been stated that the principal office was at Dallas, Texas, and that Poor had not used the same. The defendant as a subscriber to said Poor's Manual, has permitted and allowed the statement to be therein made that the executive offices of the company are at Dallas, Texas, while its central office is in New York, as aforesaid. Beginning in 1871, when the company was organized, the following are the statements to be found in said Poor's Manual as to the offices of the company:

Date.

- 1871-'2. Principal office and address, corner Warren and West streets, New York.
- 1872-'3. Principal office and address, 20 Exchange place, New York.
- 1873-'4. Principal office and address, 20 Exchange place, New York.
- 1874-'5. Principal office and address, 20 Exchange place, New York.
- 1875-'6. Principal office and address, 20 Exchange place, New York.
- 1876-'7. Principal office and address, Marshall, Texas. Executive office, 275 South street, Philadelphia, Penn.
- 1877-'8. General offices, Marshall, Texas. Executive office, Philadelphia, Penn. New York transfer office, No. 50 Exchange place, New York city.
- 1878. Same.
- 1879. Principal office and address, Marshall, Texas. Executive office, 275 South Fourth street, Philadelphia, Pa.
- 1880. Same. Transfer office, Farmers' Loan and Trust Company, New York.
- 1881. Same.
- 1882. Principal office and address, St. Louis, Mo. General offices, 195 Broadway, New York.
- 1883. Same.
- 1884. Same.
- 1885. Executive offices, St. Louis, Mo.
- 1885. General office, 195 Broadway, New York.
- 1886. Receiver, Brown & Co., Dallas, Texas. Jay Gould, president, New York. Executive offices, Dallas, Texas. General office, 195 Broadway, New York.
- 1887. Same.
- 1888. Same.
- 1889. Same.
- 1890. Same.
- 1891. Same.

- 19 The plaintiff also then offered in evidence the affidavit of John Henry Clayton, and the stipulation by the attorney for

the defendant to accept said affidavit as proof of the allegations contained in the paragraph numbered first of the complaint. The stipulation was marked "Plaintiff's Exhibit A," and was as follows:

United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES }  
Anderson Earle }  
against }  
THE TEXAS AND PACIFIC RAILWAY COMPANY. }

It is hereby stipulated and agreed that the original affidavits, of which the annexed are copies, shall be accepted by the defendant as proof of the allegations contained in the paragraph numbered "First" of the complaint in the above-entitled actions; and further proof of said paragraphs is hereby waived in each of said actions.

Dated New York, February 24th, 1897.

(Signed)

RUSH TAGGART,

*Attorney for Defendant.*

The affidavit of John Henry Clayton was marked "Plaintiff's Exhibit A 1," and was as follows:

20 United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES }  
Anderson Earle }  
against }  
THE TEXAS AND PACIFIC RAILWAY COMPANY. }

KINGDOM OF GREAT BRITAIN, } ss:  
City of Liverpool, }

I, John Henry Clayton, of the city of Liverpool, England, being duly sworn, depose and say as follows:

That from the 1st day of October, 1894, to and including the 9th day of August, 1895, I was a member of the firm of Newell & Clayton. During all of said times the said firm was composed of John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, as partners, doing business as cotton brokers in the said city of Liverpool, England, and during all of said times said persons were, and are now, subjects of the Queen of Great Britain and Ireland. The plaintiffs are now partners as aforesaid.

JOHN H. CLAYTON.

Sworn to before me this 1st day of December, 1896.

JOHN DICKINSON,

*Notary Public, Liverpool.*

21 To all to whom these presents shall come, I, John Dickinson, notary public by royal authority, duly admitted and sworn, residing and practising in the city of Liverpool, in England, do hereby certify that, on the 1st day of December, 1896, personally

appeared before me John Henry Clayton, the within-named deponent, who did depose to the truth of the within-written affidavit, and I further certify that the signature "John H. Clayton" is the true and original signature of the said deponent.

In testimony whereof, I have hereunto set my hand and affixed my seal notarial the 2d day of December, 1896,

JOHN DICKINSON,

[SEAL.]

*Notary Public, Liverpool.*

I, the undersigned, consul of the United States of America for the port of Liverpool and its dependencies, do certify and make known, to whom these presents shall come, that the signature John Dickinson to the annexed certificate subscribed is genuine; that the said John Dickinson is a notary public of respectability, doing business in Liverpool, and that to the said certificate, as signed, in my opinion, full faith and credit are due.

Given under my hand and seal of office, at Liverpool,  
[SEAL.] this 2d day of Dec., and year of our Lord one thousand eight hundred and ninety-six.

JAMES E. NEAL,

*U. S. Consul.*

22 The plaintiff thereupon offered in evidence four bills of lading hereto attached, made a part hereof and marked "B. L. 35," "B. L. 61," "B. L. 28" and "B. L. 29" (Exhibits B. L. 1 to 4 printed *post*, at pp. 131 *et seq.*).

The plaintiff also offered stipulation as to the method of proof of value of cotton, marked "Exhibit C" and made part hereof (printed *post*, pp. 143 *et seq.*).

The plaintiff further offered in evidence four invoices of the cotton referred to and covered in said bills of lading, which were received in evidence and marked "Exhibits D 1," "D 2," "D 3" and "D 4," which are made part of this bill of exceptions respectively (printed *post*, pp. 145 *et seq.*).

Thereupon the plaintiff called as a witness EDWARD R. POWERS, who testified as follows:

I am superintendent of the New York cotton exchange, and have been since the 1st of October, 1872. I have looked up the price of cotton at New Orleans at different dates in October, 1894, of middling and fancy middling and good middling, and the various grades mentioned on the paper which is shown me. As they call it at Liverpool, "fully" middling is not used in this country. It is called "strict" middling; that is, it is a grade between middling and good middling. On the 23d of October, 1894, middling was five and five-sixteenths cents per pound. Good middling, five and five-eighths cents per pound, and strict middling, five and fifteen thirty-seconds. There is some allowance for staples in those prices, an allowance from an eighth to three-sixteenths. There is an eighth of a penny, which we would call a quarter of a cent, and from a sixteenth to an eighth. They allow a thirty-second, which we would call an eighth

of a cent. We figure it in that way. The various grades of cotton of which I have so far given the prices, which I have prepared at different dates, have been taken by me from the invoices which are now shown me marked "D 1," "D 2," "D 3" and "D 4." The price of middling I have given at five and five-sixteenths on the

23d of October, 1894; adding a quarter of a cent for staple would make it five and nine-sixteenths; that was the price of

New Orleans middling on October 23, 1894. I have given the price of good middling at New Orleans on the same date. I have given as five and five-eighths, adding an eighth for staple makes it five and six-eighths, as the price at New Orleans for good middling on October 23, 1894. I have given the price of strict middling on October 23, 1894, at New Orleans, as five and fifteen thirty-seconds; adding one-eighth for staple would give five and nineteen thirty-seconds as the price on that date at New Orleans for what is called "strict" middling. On October 10th, 1894, the price at New Orleans for strict good middling was six and one-quarter cents; add an eighth for staple would make six and three-eighths; add a quarter for staple would make six and one-half. Good middling on the same date was six cents, adding a quarter for staple makes six and a quarter. On October 15th, the New Orleans price for good middling was five and thirteen-sixteenths; adding a quarter for staple would make it five and seventeen-sixteenths; of strict middling, five and five-eighths, adding a quarter, five and six-eighths; and adding an eighth to the staple of good middling price, that is, adding an eighth to five and thirteen-sixteenths would give five and fifteen-sixteenths for good middling at New Orleans on October 15th, for which an eighth was added for staple.

#### Cross-examination by Mr. TAGGART:

These quotations are taken from the New Orleans circular of those dates. There are several quotations made daily. It is not the highest or lowest; there is one grade, for instance, middling quoted as middling, but nothing but that. In New York we have the middling takes the grade above and below. I suppose they have the same thing there. I could not answer as to whether there was any fluctuation in price on the New Orleans market on any of those days in any of those grades. There might have been some

24 little fluctuation, but not much in the ordinary grade, because that is a special quotation sent out to the world. I would have to send down to New Orleans to see whether or not there was any variation in the price between morning and evening quotations, for instance, on the 1st of October. My records do not show that. We have what they call their official quotation of prices on the New Orleans market; that is the closing quotation in each case; it is the only quotation that is made there. It is the only quotation that is sent to me and I am positive it is the only quotation that is made there. I think that, on spots, there is no regular quotation made at the morning call—the opening quotation.

MARVELLE C. WEBBER, was then recalled on behalf of the plaintiff, and testified as follows:

I am a lawyer and one of the assistants of the plaintiffs' attorneys. I have made some calculations in relation to the price of cotton involved in this case. I have taken the prices as stated by Mr. Powers for the different grades of cotton, and, taking the invoices to get the weight. I have multiplied the value of the cotton of each grade per pound by the weight so as to ascertain what the cotton involved in this suit would amount to by a matter of multiplication. On the bill of lading No. 35 there were 118 bales of cotton marked "T. C. U. P." that were burned. Mr. Powers has stated that the price of good middlings on that day, the day of the date of the bill of lading, was five and seventeen sixteenths cents per pound. Now according to the stipulation as to the weight of the cotton each bale of cotton on that bill of lading would weigh five hundred and thirty-three and twenty-five one-hundredths pounds. One hundred and eighteen bales then would weigh sixty-two thousand nine hundred and twenty-three pounds. That, multiplied by five and seventeen-sixteenths cents per pound, will amount to \$3,485.47. But according to the stipulation there is to be deducted from that seventy-five

cents per hundred pounds of freight; that amounts to 25 \$471.92, and making the deduction, the value of the one hundred and eighteen bales marked "T. C. U. P." at New Orleans on the date of the bill of lading, \$3,013.55. I have gone through a similar calculation as to each lot of cotton mentioned on each of the four bills of lading involved in this case. Going on with the bill of lading No. 35, sixteen bales marked "S. A. B. O." at five and six-eighths cents would amount to \$490.59, less freight \$3.67, leaves \$486.92, value of the cotton in New Orleans at that date. Fifty-one bales of cotton marked "O. X. F. O." at five and fifteen-sixteenths cents is \$1,362.24, less freight \$203.97, leaves \$1,158.27, the value of the cotton in New Orleans at that date. All of those figures are given on the statement which I have before me; they are all figured out on this paper.

Mr. CLEVELAND: Will you consent to receive that statement as his evidence?

Mr. TAGGART: Yes.

The total on this bill of lading No. 35 is \$5,115.19. On bill of lading 29 the total is \$3,035.39. On bill of lading 61, \$1,973.49. On bill of lading 28, \$2,657.28. Making a total for the four bills of lading of \$12,781.35.

Cross-examination by Mr. TAGGART:

There were eight bales marked "T. C. U. P." that were not burned. They are on one bill of lading and are one invoice. I don't remember the number.

By the COURT:

Q. T. C. U. P. is on the bill of lading 29 - twelve bales?

A. But those were burned.



Q. One hundred and eighteen?

A. They were burned. On bill of lading 28 there were eight bales T. C. U. P., which we consider are the ones that were carried forward—were not burned.

26 By Mr. TAGGART:

As to how I arrive at that, I do not know positively, of course, that those were the eight bales that were delivered, but on the invoice these eight bales—on invoice dated October 10—these eight bales T. C. U. P. may be found, and the bill of lading that carried forward those bales of cotton is bill of lading No. 28.

By Mr. CLEVELAND:

I mean on which they were shipped. They are also marked "T. C. U. P." The rest of the other marks, "T. C. U. P.," were of a larger sum than eight bales, and, it being the fact that there were eight bales T. C. U. P. that went forward, I considered that it was on this bill of lading 28. Of course, it is not absolutely certain that that was the eight bales.

By Mr. TAGGART:

I did not understand that the stipulation provided that in that event the lowest-priced cotton of these particular marks was to be considered the cotton which was delivered, but the lowest price of those particular marks on that invoice, I think. I say that the cotton on this particular invoice, which is of a higher grade and higher price than the 118 bales, was not destroyed. You have the benefit of the better grade in that particular case. I treat the eight T. C. U. P. as delivered. I also treated as delivered 25 bales of the 51 bales marked "O. X. F. O.," which is on bill of lading 61, because the invoice shows that there were other marks "Q. B. B. E. and J. A. X. O.," and they appear on bill of lading 61. Of the two lots of O. X. F. O. 51, I took as delivered the one which is in bill of lading No. 61. The invoice is dated October 24. My invoice shows by marks that the cotton O. X. F. O. burned as on invoice dated October 24. I am taking the marks on my invoice as to the particular cotton that was burned. I cannot tell whether they are different dates and different prices.

27 By Mr. CLEVELAND:

The price at which I have taken the 25 bales of the 51 bales is the value of good middling cotton on October 23d at New Orleans.

By Mr. TAGGART:

I find the total amount by my calculations is \$12,781.35.

Mr. TAGGART: We have not time to verify this.

Mr. CLEVELAND: If it be not correct it can be verified hereafter.

Mr. Cleveland offers in evidence the schedule of prices; marked "Exhibit E" (not printed. See stipulation, p. 155 *post*).

Thereupon the plaintiffs rested their case, and defendant's counsel

then moved the court to direct the jury to render a verdict for the defendant upon the following grounds:

First. That the plaintiffs' complaint is wholly unproved in its entire scope and meaning. That there was not a variance but an entire failure of proof of the cause of action alleged in the complaint.

Second. That the allegations of the complaint are that these bales of cotton were, on or about the 12th day of November, 1894, wholly destroyed by fire at Westwego, Louisiana, aforesaid, at which time and place the same were in the possession of the defendant in the course of such carriage, and as a common carrier; the answer, admitting that the said cotton was destroyed at Westwego, Louisiana, aforesaid, denies each and every other allegation respecting the possession of said cotton; and that there was no proof of any of the allegations of the complaint in this regard.

The first ground on which I desire to move for a direction is that the plaintiffs' complaint is wholly unproved in its entire scope and meaning. There is not a variance, but an entire failure of proof in this case. The ground upon which that motion is made is this:

28 If you will examine the complaint you will find in paragraphs 3 and 4 allegations to this effect—that in the month of October, 1894, at Bonham, the plaintiffs, through an agent, entered into a contract for the shipment of cotton from Bonham to Liverpool, England. My motion is not only addressed to the question which is there made of an entire contract between Bonham and Liverpool, but as to the nature of the contract which is set forth in the complaint. Your honor will observe that it is an unrestricted contract of shipment of cotton from Bonham to Liverpool; that is to say, a common-law receipt by a carrier of goods, subject to no restrictions whatever. In other words, the contract he sets up in his complaint is a contract by which the defendant undertook, on a common-law obligation as a carrier, without any restrictions whatever, to carry from Bonham, Texas, to the city of Liverpool, England, and an averment subsequently that in the course of such carriage this cotton was lost. The law side of this court, as I understand it, is controlled in its local practice by the provisions of the New York code of civil procedure, which has two sections which apply to a question of this character. If a complaint alleges imperfectly and irregularly facts, and the facts are then introduced, it forms what the court will regard as a variance, and if the other party has been misled thereby the court may make such provisions as to amendments, costs, etc., as the court in its discretion may think proper. But your honor will find alongside of that another section of the code which relates to a total failure of proof, to which I wish to call your honor's attention, and in a case of that character, where an entirely different cause of action is alleged from that which is set out in the proof, no amendment is permissible; there is what is called an entire failure of proof, the complaint being, in its entire scope and meaning, unproved. Now, as Pomeroy, in the section to which I shall call your honor's attention, discusses the question when one contract is set forth in the



complaint, and another contract—an entirely different contract—is proved, in that case the complaint is deemed to be entirely unsupported by the testimony, and under authorities in New York and under authorities in Ohio and elsewhere where this question has been considered—precisely this question which is met here has been considered by the courts under codes of procedure similar in character to that of New York—it is held that where a complaint sets forth a common-law liability of a common carrier and the party comes in and proves a different special contract upon a bill of lading, that it falls within the definition, not of a variance, but of a total failure of proof. It is so stated by Baylies in his Trial Practice, citing a number of authorities in New York, and the Ohio supreme court had this question under consideration, in the 2d Ohio State, in *Davidson vs. Graham*, and they held that a complaint alleging a general liability as a common carrier, and the proof being a special bill of lading with special provisions as to liability, exemptions, etc., that it was unproved in its entire scope and meaning. \* \* \*

Now, there is another ground upon which our authorities are being prepared. Your honor has my idea and I will present the authorities on this question. There is another ground upon which on these pleadings as they stand, passing the particular phase of it I now have presented, upon which I shall ask your honor to direct a verdict, and that is this: Construing the contract which the gentleman presents, it is not a contract as has been held over and over again by the Supreme Court of the United States—it is not a contract for the carriage of cotton from Bonham to Liverpool, and, therefore, does not sustain the contention of the plaintiff. Your honor will observe that the gentleman was very careful not to read this bill of lading. In it is this provision: "Upon the following terms and conditions which are fully assented to and accepted by the owner, namely, first that the liability of the Texas and Pacific

Railway Company in respect to said cotton and under this contract is limited to its own line of railway, and will cease and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of said damage, detriment or loss." Then in the sixth paragraph: "That the said cotton shall be transported from the port of New Orleans to the port of Liverpool, England, by the Elder-Dempster & Co. steamship line, with liberty to ship by any other steamship or steamship line, and upon the delivery of said cotton to said ocean carrier at the aforesaid port, this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bill of lading and master's receipt in use by the steamship or steamship company or connecting line by which said cotton may be transported and upon delivering said cotton at the usual place of delivery to the

steamship or steamship line at the port of destination, the responsibility of the carrier shall cease." Now, in Myrick against The Michigan Central Railway Company, 107 U. S., the question was upon a similar bill of lading to this in regard to that recital, and it was held in that case, contrary to the State decisions of Illinois where the contract was made, that a bill of lading similar to this did not make the carriers partners, did not make the first carrier responsible for the entire route, but simply made each carrier responsible in turn for its own particular part of the route. Now, the allegation of this complaint, and we are to be guided by that, is that these bales of cotton were on — about the 12th day of November, 1894, wholly destroyed by fire at Westwego in the State of Louisiana aforesaid, at which time and place the same were in the possession of the defendant in the course of such carriage and as a common carrier as aforesaid.

31 The answer admits that 467 bales of cotton marked as described in that paragraph were destroyed by fire at Westwego, in the State of Louisiana, on or about the 12th day of November, 1894, but the defendant denies each and every *over* allegation in the said complaint. Now, if this contract was a contract by the Texas and Pacific Railway Company to take this cotton and transport it to the end of its line of railway, and there its responsibility should cease, under the decision which I have called your attention to and other decisions which can be quoted—and there is no proof in this case whether Westwego is on the line of defendant's railway or not, or forms a part of its line of railway—how can it be said that this complaint is sustained in that allegation, which is denied, that the defendant had possession of that cotton as a common carrier at the time of its destruction? It is only upon the theory which the plaintiff evidently has that this bill of lading is a bill of lading binding the Texas and Pacific Railway Company to carry this freight and be responsible for it the entire distance between Bouham, Texas, and Liverpool, England, that this complaint can be said to have any testimony in support of it whatever. But if, as I contend, this bill of lading is to be taken, according to its terms, as a separate liability, first, of the Texas and Pacific to carry to its terminus and there—

The COURT: To carry to New Orleans.

Mr. TAGGART: To carry to New Orleans and there its responsibility shall cease upon delivery to the next carrier, and they have averred in their complaint that at Westwego it was in our possession as a common carrier, which would mean that it was undelivered to the next carrier, and we deny that fact, is not the burden of proof upon them to show that the cotton was at that time and in that place in our possession and under our control as a common carrier? It seems to me that the statement of the proposition is all the argument that is necessary on the subject. There is no question as to

32 the law, as I understand it, upon a bill of lading of this sort. I cite the 107 U. S. because that comes into my mind at the moment in discussing the matter; there are numberless authorities to that effect; in fact, the uniform holding of the Federal courts—

not of the State courts, though the great bulk of the holdings in the State courts are to the same effect—is that under a contract of this character no joint liability is found on behalf of the first carrier, but simply a separate liability, each for its own line and each in succession, and each discharged upon delivery to the next.

The COURT: Well, I am prepared to dispose of this motion. I think there is a variance between the contract averred in the complaint and the contract proved—in this: that it is averred in the complaint that the defendant undertook, as a common carrier, to carry the goods safely and securely to Liverpool. He did not, in fact, so undertake—he undertook only to carry them safely and securely to the port of New Orleans, and there to deliver them to the ocean carrier, and upon doing so he had fulfilled entirely the obligations of this contract. But that variance is immaterial, if, as a matter of fact, this fire occurred before he had completed his obligations under the contract and had transported the goods to New Orleans and delivered them to the ocean carrier, and upon the proof as it stands the averment in the complaint and the admission in the answer as to the fact that Westwego is the terminus of the line, or at least one terminus of defendant's line, I think there is sufficient proof here to sustain the averment of the complaint, with that variance, which is immaterial in my judgment. I will therefore deny the motion, with exceptions to the defendant and leave to renew at the close of the entire case if you wish to do so.

Thereupon Mr. Masten opened the case for the defendant to the jury, and the defendant called as a witness Charles E. Satterlee, who testified as follows, an affidavit of the witness being by consent of the parties received in place of his oral testimony:

In the year 1885 the Texas and Pacific Railway Company was placed in the hands of receivers appointed by the circuit courts of the United States for the eastern and western district of Louisiana. That said receivership was continued under proceedings to foreclose several of the mortgages of the said railway company during the years 1886, 1887 and 1888. That the receivers so appointed were John C. Brown and Lionel A. Sheldon. That subsequently to such appointment one of the receivers, Lionel A. Sheldon, resigned, and John C. Brown remained the sole receiver of said railroad and property until the termination of the receivership in October, 1888. That the general offices of said receivers were by them established and maintained throughout the period of said receivership at the city of Dallas, in the State of Texas. That upon the termination of said receivership the railroad and property of the said Texas and Pacific Railway Company was restored to that company, and until the present day the said Texas and Pacific Railway Company has and maintains its general or principal offices in the city of Dallas, in the State of Texas.

That prior to the year 1889 the city of Marshall, Texas, claimed that the Texas and Pacific Railway Company had entered into an engagement or contract with the said city to maintain its offices,

machine shops, etc., in said city of Marshall. That at the time of the appointment of said receivers there was pending in the circuit court of the United States for the eastern district of Texas a suit instituted by the city of Marshall to compel the removal of the offices of the Texas and Pacific Railway Company to said city of Marshall, and a mandatory injunction had been obtained requiring such removal and the maintenance of such offices, machine shops, etc., at the city of Marshall, which said injunction was continued as against said receivers. That the judgment in said suit requiring such removal and maintenance of said offices at Marshall was taken by writ of error to the Supreme Court of the United States. That in the year 1889 the legislature of the State of Texas passed an act, which was approved on the 27th day of March, 1889, requiring railway companies doing business within the State to maintain their general offices therein. Deponent prays that reference to said act may be had on the hearing of this application. That the executive committee of the board of directors of the Texas and Pacific Railway Company, at a meeting held in the city of New York on the 15th day of July, 1889, adopted the following preamble and resolutions:

"Whereas, by an act of the Texas legislature, approved March 27, 1889, all railroad companies chartered by the State of Texas, or owning or operating any line of railway within the State, are required to keep and maintain permanently their general offices, machine shops, round-houses, &c., within the State at certain places, and to keep all books, accounts, &c., at said offices; and

"Whereas, the Texas and Pacific Railway Company, without waiving any of its chartered or legal rights in the premises, is willing, out of respect to the legislative expression of the State of Texas, to consider said act as applicable to it and to act accordingly; therefore,

"Resolved, That — is the purpose of this company fully to comply with said law in letter and spirit, and to that end the general manager of this company be, and is hereby, instructed to immediately make arrangements for the removal of the general offices now at Dallas to Marshall, Texas, and to establish in the said city of Marshall the following offices of this company, viz:

35 "Office of vice-president.

General manager.

Chief engineer.

Secretary and treasurer.

Auditor.

General freight agent.

General passenger agent.

Superintendent of motive power and machinery.

Master of transportation.

Stock and fuel agent.

Claim agent.

"And to have all the books and papers connected therewith kept in said general offices."

That the said Texas and Pacific Railway Company was then in possession of its railroad and property, and the general or principal offices of the said receivers which had been established at Dallas, Texas, as aforesaid, were continued as the general or principal offices of the said railway company. That when said railway company, in pursuance of the resolution hereinbefore recited, was about to remove its said offices to Marshall, Texas, it was prevented from doing so by an injunction obtained by certain citizens of the city of Dallas in one of the local courts restraining and prohibiting such removal. That said injunction was continued upon final hearing, and pending the appeal thereof the Supreme Court of the United States decided the said case of *The City of Marshall vs. The Texas and Pacific Railway Company* adversely to the city of Marshall.

Deponent says that the only office maintained by the defendant railway company in the city of New York consists of two rooms at 195 Broadway in said city. That the president and this deponent, the secretary and treasurer, are the only officers of the said company who reside in the city of New York or who have any office in said city connected with the affairs of the said railway company, except a freight agency at 391 Broadway, in charge of a general eastern agent. Said office of the company in the city of New York is also known as the transfer office of the said railway company, and transfers of the stock of said company may be made at said office.

That the general or principal office of the Texas and Pacific Railway Company located at Dallas, Texas, consists of the offices of the heads of all departments of the said railway company, namely: The general management, covering the operation of the road and transportation of freight and passengers; the accounting department, the legal department for the State, the land and tax department and the supply department, and at said general offices at Dallas, Texas, the offices of the following officers and agents of the said railway company are maintained, namely, the third vice-president, general passenger agent, the auditor, the general freight agent, the general passenger agent, the *the* land and tax commissioner, the assistant secretary and treasurer, master of transportation, general attorney for the State of Texas and other subordinate officers and agents of said railway company, and that all the books, papers and vouchers connected with said offices are kept at said offices and the revenues from the railroad and property of the said railway company are there received and disbursed. That the disbursements of the said railway company in the city of New York are made almost exclusively out of remittances received from the general offices of the company at Dallas and extend only to the payment of interest upon the bonded debt of the said railway company and incidental disbursements, including expenses of maintaining said New York office. The disbursements made by this deponent as treasurer of the company are reported monthly to the auditor and the vouchers covering such disbursements are transmitted to him with such monthly reports and kept in his office at Dallas, and all journal entries connected with the transactions of the New York office are

transmitted to the auditor for entry upon the general books of the company which are kept in his office.

37 That the Texas and Pacific Railway Company has 336 miles of road in the State of Louisiana, making a through line from New Orleans to the Texas State line and thence to El Paso, in the State of Texas. The accounting covering all the operations of the said railway company and all its property in the State of Louisiana is had at the general offices of the railway company at Dallas, and the officers of the said railway company at Dallas are in charge and control of these matters.

This deponent further says that the entire road-bed and right of way of the Texas and Pacific Railway Company is situated in the State of Texas and in the State of Louisiana; that the machine shops, round-houses and all of the physical properties of the said Texas and Pacific Railway Company are likewise situated in the States of Texas and Louisiana; that the exercise of its franchises as a railroad company is confined exclusively to said States of Texas and Louisiana; that heretofore, to wit, in the year 1891, the Texas and Pacific constructed a large office building in the city of Dallas at an expense of \$90,000, said building having a frontage of 30 feet and a depth of 120 feet, and being four stories high; that said building was constructed for the purpose of maintaining therein the general offices of the Texas and Pacific Railway Company, and since its construction the general offices of said company have been maintained therein, and are at this time being maintained therein; that the office of the general manager and the third vice-president of this company, the office of assistant general manager, the office of the general attorney for Texas, the office of the auditor and assistant treasurer are located in said building in the city of Dallas, and that the business of this defendant is conducted and carried on in said general office in the city of Dallas, and that claims, demands or judgments against this defendant are presented and audited in said general offices in the city of Dallas; that

38 all the records pertaining to the business growing out of the operation of said road are kept in said building in the city of Dallas. This deponent further says that all suits, claims or demands of the character sued for herein are handled by the proper officers of this company in the said city of Dallas, and this deponent is advised and informed that the claim sued upon herein was presented to and filed with this defendant at its general offices in the city of Dallas. This deponent further says that, in the event that final judgment should be recovered against it herein, the matter of auditing same would have to be done through the general officers of this company in said city of Dallas. This deponent further says that, by virtue of an act of the legislature of the State of Texas, entitled "An act to encourage the speedy construction of a railway through Texas to the Pacific ocean," passed May 24th, 1871, and an act supplemental and amendatory thereof, passed November 25th, 1871, authority was given to the Southern Transcontinental Railway Company and to the Southern Pacific Railroad Company, corporations created by acts of the legislature of the State of Texas,



to become consolidated with the Texas and Pacific Railway Company, a corporation created by an act of Congress of the United States; that, in pursuance of said act, said consolidation was perfected, and this defendant, The Texas and Pacific Railway Company, obtained various properties and franchises thereunder, and is exercising said franchises received by virtue and authority of said act at this time. Under and by virtue and authority of said act of the legislature aforesaid it constructed a line of road from the town of Marshall, in Harrison county, Texas, to the city of Jefferson, in Marion county, Texas, and from the city of Jefferson to Texarkana, in Bowie county, Texas, and from said city of Texarkana to the city of Fort Worth, in Tarrant county, Texas, which line of road this defendant is now operating in connection with its main line, which said main line commences at the city of Marshall, in

39 Harrison county, Texas, and terminates in the city of El Paso, El Paso county, Texas. That the laws of the State of Texas provides that the "public office of a railroad corporation shall be considered the domicile of such corporation." That in accordance with the laws of the State of Texas this defendant has established its public or general offices in the city of Dallas, Dallas county, Texas, and said general offices are at this time located and established in said Dallas county, Texas, and are considered by the Texas and Pacific Railway Company to be their public or general offices, and service upon said company in suits brought against it in the State of Texas and in said northern district of Texas can be had by serving any one of its general officers who are located and reside in the city of Dallas, or by leaving citation at the office of the third vice-president or general manager in said city of Dallas, Dallas county, Texas.

Deponent states that the defendant railway company is a corporation organized under the laws of the United States, and prays upon the hearing herein that reference may be had to its charter and to the laws of the State of Texas affecting the said railway company. That the annual meeting of the stockholders of the defendant railway company is held in the city of New York, and an adjourned meeting of said stockholders is held at the general offices of the company at Dallas. And that the same is true as well in respect to the annual meeting of the board of directors of said railway company. That the meetings of the executive committee of the board are usually held in the city of New York, which meetings are infrequent, averaging, say, two to four in a year.

C. G. MILLER, being examined by Mr. Taggart as a witness in behalf of the defendant, testified as follows (his testimony being read from a deposition previously taken in the cause):

Direct examination by Mr. CLEVELAND:

40 My occupation is freight agent of the Texas and Pacific Railway Company at New Orleans. I am the local freight agent. There is a division freight agent and a local freight agent. I was such local freight agent in October and November,

1894, and had been prior to November 12, 1894, such local freight agent about three years. I am now 30 years old. My office was situated at the foot of Thalia street in New Orleans. My duties as freight agent were generally in charge of the terminals at New Orleans and Westwego, the Texas and Pacific terminals, the warehouses and yards. The Texas and Pacific railway had in or near New Orleans on November 12, 1894, warehouses, yards and terminals as follows: The freight depot at New Orleans, at the foot of Thalia street, in which my office was located, and the cotton shed and sky lot or cotton warehouse—a cotton warehouse known as the sky lot—this is near the foot of Thalia street; then there were the yards at Gouldsboro, across the river from our terminals in New Orleans. There are no warehouses in Gouldsboro. There are machine shops there, a round-house, yards containing switches, principally for storing freight, but nothing for the storage of cotton and no cotton sheds or docks there. Then there were our terminals at Westwego, besides. These Westwego terminals were not built at the time I became freight agent. They were built during the time I was here as freight agent, but not under my supervision. I have not the plans from which Westwego was built; nor have I any of them. Mr. Taggart may have some of the plans.

Mr. TAGGART: I have not anything of that kind.

The bridge and building department of the Texas and Pacific road may have these plans. This department is in Dallas, Texas. I have no plans, specifications, maps, diagrams or other papers showing what the Westwego sheds were in October and November, 1894, in so far as the official diagrams are concerned. I did  
41 have a pencil diagram within the past day or two—nothing else besides this. I did not say I had furnished them to Mr. Taggart. When I spoke of Mr. Taggart I had reference to a print that was under discussion here a day or two ago. I have not that blue print.

Mr. CLEVELAND: Will you please furnish them, Mr. Taggart?

Mr. TAGGART: No, sir; I will not furnish them.

I have no copy of the blue print or any other print or diagram of the docks at Westwego. Mr. Taggart should have this blue print.

(To Mr. Taggart:) Now, Mr. Taggart, I will ask you to produce this blue print.

Mr. TAGGART: I decline to produce the blue print which I have.

I have nothing else that will give an accurate representation of the Westwego docks as they existed prior to the fire. I know in a general way what the location was. I think Mr. Wathen, the chief engineer, would have a map or diagram showing the accurate representation of the docks as they existed prior to the fire. There are no maps or diagrams in New Orleans to my knowledge or information. I don't know of any photographs although I think, probably, our general attorneys, Howe, Spencer & Cocke, have a photograph; they did have one a while back. I have in my office



no such photograph; have no plan of our warehouses hanging on the walls of my office. I do not remember when I did last see one irrespective of the blue print. I suppose the blue print was furnished by our "B. & B." department, and probably the original design of the wharf. The wharf at Westwego, I think, was built by a firm by the name of Griggsby Brothers, contractors. I don't  
 42 know where they are. My opinion is, and my recollection is, that they are a Texas firm. Beginning with those highest in authority, the Texas and Pacific railroad officials in October and November, 1894, were Mr. L. S. Thorne, third vice-president and general manager; next to him came Mr. J. W. Everman, assistant general manager; then, in the transportation department, Mr. N. G. Pearsall, first assistant superintendent; in the traffic department there was E. L. Sargeant, general freight agent, and Assistant General Freight Agent G. H. Turner; in the accounting department is R. Fenby, auditor; Local Treasurer L. S. Smith, and B. S. Wathen, chief engineer of the "B. & B." department. Those were our main officers. The persons who were immediately under me at Westwego at that time were Mr. A. L. Wilkinson, who was my chief clerk; there were various employees directly under Mr. Wilkinson and indirectly under myself; I cannot recall the names of all of them, but will give you such as I can. Mr. N. G. Figures was chief clerk for Mr. Wilkinson. There was a Mr. Smith, a cotton clerk; I don't remember his initials. Mr. Sykes was foreman, and Mr. Trainor, the gentleman here yesterday, was check clerk. There was a party by the name of Baker, also a check clerk. A man by the name of Valle Ruba, who was there, either a check or a delivery clerk; a man by the name of Kelly, either a check or delivery clerk. There were the Boylan watchmen, one by the name of Peake, one named Robau and one named Schoen; there was a private watchman by the name of Schurb, either a private or Boylan watchman; a private watchman by the name of Valle. Those are not all, but all that I can recall at this time at Westwego, aside from the laborers. I do not know the names of the laborers. A general description of the books that we kept in our office here in the city, in October and November, 1894, is, first, our cotton books in the cotton office—a record of cotton; we had in-bound-freight account books, cash books and other books. The records were rather voluminous.

43 Q. Can you specify any more than these in-bound-freight books and cotton books?

A. No, sir; they embrace about all the records, I think.

Q. Will you describe to me all the documents which you, and by you—I mean the Texas and Pacific Railway Company—received, in relation to shipments of cotton from any point in Texas to Westwego in 1894, giving me the names of the various documents that the company received—notifications for the shipments of cotton, the names of the books, if any—in which any particulars from those documents were entered, and the general course of business in relation to any shipment.

A. The only document that accompanied the cotton was the waybill, a sort of manifest, showing each car and the marks of the cot-

ton, the bill of lading—or, rather the number of bales on the bill of lading—and the name of the shipper, and, in many instances, the name of the consignee and destination. Those are about all the documents that accompanied the cotton in New Orleans.

Q. Then in what book or books were any particulars from any of these papers that you have last mentioned entered in your office?

A. In our regular books, which we had for that purpose in our cotton office. These would probably be designated as our foreign cotton books. I am speaking from memory; that would probably be the books that these entries would appear in, for the reason that it contained the record of the foreign cotton.

Q. Look at the paper which I now show you, Mr. Miller, and which will be marked "Plaintiffs' Exhibit No. 4," which purports to be a bill of lading dated at Bonham, Texas, under date of the 5th of October, 1894. In the course of business did you receive such a document as that?

A. In the course of business we should receive it. We did not always receive it. What was termed a copy, supposed to be  
44 a copy of the original bills of lading which went with a shipment. I do not know that we have a copy of this bill of lading. They are termed "ship's copies," and I am not sure whether we retained those in our office or turned them over to the steamship agents. I am satisfied we did turn some over to the steamship people here. We designate them as "ship's copies." J. B. Booth, whose name is signed on that bill of lading there in October, 1894, I presume is the agent of the Texas and Pacific Railway Company at Bonham, Texas. I know his name as such; I did not know Mr. Booth. The waybill would not accompany the ship's copy of the bill of lading; the ship's copy usually comes by mail or express, and the waybill comes with the car containing the cotton.

Q. I shall want to have the waybills that accompanied all of the cotton involved in these different actions. Where is the cotton book, which you speak of as keeping, in which you made some entries in relation to this cotton?

A. That is in my office.

Q. I want that, Mr. Miller, if you will produce that, please, and then the in-bound-freight books in which there is any entry relating to any of these bills of lading or shipments of cotton.

A. The in-bound-freight books I will explain are merely for the use of keeping our account of the freight charges. They would have no information as to the cotton. The waybill is simply entered up in there—the number of the billing—where from, and the steamship line via which this cotton is consigned, with the amount of charges due us.

Q. Then I will ask you to produce the in-bound-freight book, so that I may look at it, Mr. Miller, and you will also, of course, produce the cotton books. Now, what books were kept at Westwego?

A. We also kept cotton books at Westwego, somewhat similar, as to the purposes for which they were used, to the books we kept in

the office at the foot of Thalia street—my office. I do not know whether we have the cotton books that were kept at Westwego, whether we saved them from the fire or not. I am informed that some of the records were burned. I performed my duties of local freight agent principally at New Orleans. New Orleans was the central location. I spent most of my time here in New Orleans. I had no regular time to go to Westwego; I went up pretty often during the busy season. I may have on several occasions sent a chief clerk or a clerk up to Westwego. Mr. Steel was not my chief clerk, he was my chief cotton clerk whose office was in the same building that my office is in New Orleans; he did not frequently visit Westwego for me, he went there, I suppose, from time to time; he did not go as frequently to Westwego as I; I went to Westwego for the purpose, generally, of supervising the handling of the business there; I was up there probably a day or two previous to November 12, 1894. I do not recollect the fact as to the exact date. At the time I was there, a day or two prior to November 12, it is likely that there were about the same number of bales of cotton at Westwego as were there at the time the wharf was burned; that was about twenty thousand bales. I cannot give it to you to the bale. It was not much in excess of twenty thousand bales so far as that burned on the wharf is concerned; probably a few hundred over. I don't know exactly how many bales were burned on the wharf. I have had a computation made of how many bales were burned and it is at the office; it was about twenty thousand on the wharf and about two thousand in the cars; I say approximate figures; I do not know as to the date of the last delivery of cotton on board ship at Westwego prior to November 12, 1894; but during the week previous we delivered cotton. There were likely no bales of cotton delivered at Westwego on November 11th, that is, unloaded from cars and placed in the sheds; November 11th being Sunday, I doubt if there was any, though there may have been some unloaded; we did work at times on Sunday up there; I doubt whether we were working on November 11th, 1894; I don't recollect as to it at all; on November 12th I was in New Orleans; I am not positive; I may have been at Westwego, but I don't think I was. I have no doubt I was working at my office on November 11th, 1894; I cannot recall the fact; I may have been; I cannot say how many bales were delivered at Westwego on November 10th; I cannot tell from the bill of lading, "Plaintiff's Exhibit No. 4," when the cotton mentioned in this bill of lading arrived at Westwego. This particular bill of lading is marked No. 35; that I judge to be the consecutive number of bills of lading issued at Bonham, Texas; that is, the export bills of lading issued. On the next line is "T & P. Contract No. 44;" that refers very likely to the contract that we make here with the steamship agents. The marks "3830 Denistown, 11495/2," I do not know what they refer to. I have not my letterpress copy books here covering the year 1894.

Q. I shall want them, please, Mr. Miller.

A. Yes, sir.

I have not individually received from the plaintiffs in this action

certain letters or demands. I do not know whether the company has received them or not. They would not necessarily come into my department. They would likely come to our freight claim department at Dallas, Texas. I have no such documents in my possession. Any that I might have received would have been forwarded on to our freight claim department. My letter-press copy books would contain copies of the letters transmitting these documents. Mr. Fenby is located in Dallas; he probably would have those documents. I had something to do with employing the Boylan men, and very likely saw Col. Boylan prior to November 12, 1894, in the month of November; I do not recollect; I do not recall any specific dates; nor in the month of October; I recall that I saw him generally from time to time. We probably had some correspondence with him in October and November, 1894. I usually wrote the letters in my

office. I had a stenographer. A record was kept of the payments that were made at New Orleans to the various employees at the office. We made payments at Westwego to the employees up there; to nobody but the laborers, so far as my office is concerned. The laborers only were paid at Westwego. The check clerks, shipping clerks and the clerical force at Westwego were usually paid, if I recollect rightly, by the paymaster on the pay-car. My recollection is that the paymaster stopped his car at Westwego en route to New Orleans, and that he made those payments from the pay-rolls. I should have the accounts of these employees in my office. In November, 1894, the railway company had regularly employed at Westwego one day watchman, a private watchman, not far from the Boylan office, and one at night. The name of the day watchman employed at the time of the fire was Schurb. The name of the night watchman was Valle. The main man in charge of the clerical force at Westwego was Mr. Wilkinson. He had been in the employ of the company since along in the early spring of the year 1894, probably February. He was called chief clerk. There was a Mr. Roth, superintendent of the Westwego elevator; not of the wharf, however; there was no superintendent of the wharf. The person in charge of the wharf for the railway company was the chief clerk, Mr. Wilkinson, so far as the party located permanently at Westwego was concerned. Next under him was Mr. Figures, who was Mr. Wilkinson's chief clerk; then there were the other employees that I named as being up there; the question of rank with them did not cut much figure. They were called clerks, men employed in the office to do clerical work; and then the check clerks—men on the outside—to check cotton from the cars. Mr. Figures had been in the employ of the company since the latter part of the summer of 1894, as I recollect. He was employed by Mr. Wilkinson. Mr. Sykes was employed at Westwego as foreman; he was generally in charge; his duties were in charge of the labor on the outside, the labor and check clerks. He is still employed by the company. I think Mr. Wilkinson is still employed by the company. I do not know that. Mr. Wilkinson was not discharged by the company soon after the fire. The fire occurred November 12; it was probably in the latter part of Novem-

ber or early in December that his services were dispensed with, if at all. He ceased to draw pay from the company in the latter part of November until I do not know what time. He has not been employed here in New Orleans since that time. I employed Mr. Wilkinson. I don't know whether Mr. Figures is in the employment of the company now or not. I think he is in the employment of the company somewhere in Texas. When he left New Orleans he left here to go to Terrell, but I don't know whether he is in Terrell yet or not. He was working for the Texas and Pacific Company after the fire about the same time that Mr. Wilkinson was, between the latter part of November or early part of December, and was re-employed by the company probably two or three weeks afterwards, probably in the middle or latter part of December. I do not remember how long Mr. Smith had been in the employ of the company prior to the fire. I think he probably came to Westwego about the same time as Mr. Figures, probably the latter part of the summer of 1894. Mr. Figures and Mr. Smith were employed by Mr. Wilkinson. I will say in connection with that, that I was usually consulted by Mr. Wilkinson, and that the clerks were employed with my approval, generally, and in the most important cases particularly. I do not know exactly what men familiar with the handling of cotton the Texas and Pacific had in its employ in November, 1894, who had been in its employment during the previous season. We probably had several. On the outside in New Orleans was John Driscoll, who was a sort of foreman. At one time he was chief discharging clerk at New Orleans; he was employed in October and November, 1894; he was not at Westwego; he was employed at

49 New Orleans and is yet. I do not know that we had any men at Westwego familiar with the handling of cotton, as we understood it, whom the road had had in its employment the previous season, except Mr. Sykes, who was in our employ the previous season. The previous season he was probably check clerk at New Orleans, and may have been at Westwego also. He is now in the employ of the company as check clerk.

Q. Then, with the exception of Mr. Sykes, the whole force at Westwego that season of 1895 was a new force, was it?

A. No, I do not say it was a new force. I do not recall sufficiently as regards the Westwego force. I know that Mr. Wilkinson was a new man and Mr. Figures.

Q. Did the Texas and Pacific Railway Company have any contract with any steamship company other than the contract which you say is referred to under the bill of lading marked "Plaintiff's Exhibit No. 4," as T. & P. contract No. 44?

A. Yes, sir; it did.

Q. I would like to have any other contract that they had?

A. From that I understand that you want the contracts covering all the cotton involved in these suits?

Q. Yes, sir.

A. I do not recollect any correspondence had after the fire concerning any new contracts to be entered into with the steamship companies. The question of contracts was usually handled verbally

between myself or my representatives and the steamship agents. No. 44 is a written contract. I referred, however, to the making of contracts which was handled verbally. All contracts we have with steamship companies are in writing. I have a list of those contracts. I do not know that I have any reports from Col. Boylan received by the railroad company during October and November, 1894. The reports furnished us in the ordinary course of business we do not retain. They are put in the waste-basket as a rule. They

were merely in the nature of incidental reports, and we don't  
50 make a practice of retaining any of them. I received a report shortly after November 12th in regard to the fire from

Mr. Boylan. That was sent on to the auditor at Dallas. I do not know whether I have a copy or not. I think Mr. Valle is still in the employment of the company, and has been continuously since November, 1894, to the best of my recollection, in various capacities. He was employed to my certain knowledge in the capacity of car-checker and watchman. I remember that distinctly. He was employed for a while at Westwego also, if I remember rightly. It is not a fact that I could not tell where any single lot of cotton was about November 12, 1894. I could, as a rule, always tell where cotton was from the records. One record we might tell from would be the waybills that accompanied the cotton. The waybill would be the primary record; any other record would be made from the waybill. The waybill told whether the cotton had arrived, from the mere fact of having the waybill. It came with the cotton always. It always came with the cotton. The waybill did not come in the freight car, it came in the possession of the conductor who brought in the freight car and from the waybill we made up whatever record we had. One record we made up was the entering of the waybill in the cotton book—we will say the foreign cotton book. Another record we made up was transfers. Made up a skeleton for the check clerks to check by. That was all done at Westwego. The waybills came from Westwego to my office usually the day or the day after the arrival of the cotton at Westwego. I am not positive whether we kept a separate record that was made up from the waybills at my office. I do not know what records were kept at my office in respect to that detail. I am not positive whether we kept a separate record or not, but I imagine we did. I call that record the foreign cotton book. That was made at the New Orleans office, the one I had at New Orleans and another book at Westwego. I do not know that we had  
any special term for the book that we had at Westwego.

51 We would only have use there for but one book. There were two cotton books, I think; one at Westwego and one at New Orleans. They were practically duplicates of each other, each made up from the waybills. I think I have all the cotton books which were kept at Westwego or New Orleans. Some one of the clerks at the Westwego office kept the record at Westwego that was made up from the waybills there. In November and October, 1894, probably Mr. Smith or Mr. Figures kept it. It is not the fact that the waybills remained at Westwego and the bill of lading came on to New



Orleans. The waybills first came to Westwego and were then forwarded from Westwego to New Orleans. The bills of lading came by mail or express usually; didn't accompany our shipments of cotton at all; they came direct to our New Orleans office and never came to Westwego. The waybills were usually sent over every day by mail or messenger; sometimes by messenger and sometimes by train mail, the system about it was at this time that the waybills were sent by the route that was most convenient for them to come by in order to send them over with the least delay. We had a train mail coming in at the close of the day, about seven o'clock, and another one next morning about seven, and the waybills at Westwego, not worked up in time for either of those trains, would likely come down by messenger during the day. I don't recollect the name of the messenger. We had a messenger who used to come with papers from Westwego regularly. I can find out his name for you. This messenger's duty it was to bring by hand waybills from Westwego to New Orleans; my recollection is that this messenger was located at Westwego, and that he was sent to New Orleans when the occasion should arise for sending him down with any mail matter. I have not found out yet when last prior to November 12, 1894, any ship took cotton from our dock at Westwego.

Q. What is the first matter that you have prepared for me this morning, Mr. Miller?

52 A. I have the cotton book. That is one of the documents you asked for. The book now produced is called "Contracts Foreign Cotton." The book I referred to in giving the previous testimony as being designated as foreign cotton, I find that, while I have that book, the particulars of handling and billing was not exactly as I stated; that is, as to the detail of it, and I find waybills are not entered here in that book, but that the bills of lading were; that is, the ship's copy of the bills of lading. The book that I now produce and which is marked on the outside "Season of 1894/1895, contracts foreign cotton," is not what we call the foreign cotton book. We have a number of cotton books. The foreign cotton book in which entries are made of bills of lading, we have that book at my office. I left it there today for my cotton clerk to use in checking up the other matter that you have asked for. He needs them but don't need this, so I brought this one down. As to the Westwego cotton book, we did use a cotton book, but that I distinctly remember is not at my office and that book was probably burned during the fire. That was not an especially important book. We have the same data in the way of transfers, waybills, cotton skeleton waybills.

The skeleton book was the book of first importance at Westwego; that is, at my office; I intend to produce it. The skeletons are simply abstracts of the waybills. We had a cotton book besides up there. We have a car-record book, the record of the car report and which are kept in a book. I have that here. Those are about the principal records we have there. I don't remember of any other records that we have. The waybills and bills of lading were not kept at Westwego. The books that I have named are about the



principal documents that we kept there. I do not know that the skeleton waybill book called the skeleton book, the cotton book and car-record book were the only books that were kept there. We had two or three clerks at Westwego. I did not say that only  
53 three books were used over there; that is all that I recollect. I do not recall any others. We had two or three clerks at Westwego, and they had other duties at various parts of the wharf. They had to make up the skeleton report, writing it up from the waybills; their time was not confined to office work; they had ample work, however, to keep them busy. I have some waybills here which you may examine if you would like to do so that show the arrivals at Westwego. The foreign-contract book was kept at New Orleans. I have the car-record book here.

Book produced and marked "No. 9" for identification.

This is the only book which I have that was kept at Westwego. The skeleton book is at my office. I have not figured for you how many thousand bales of cotton were stored in the sheds at Westwego on November 12, 1894, because I have had my hands full figuring up what I have here for you. I have impression copies of the pay-rolls of the employees at Westwego.

Q. And these pay-rolls were kept at Westwego?

A. The Westwego pay-rolls were made up at Westwego, so far as the extra-labor rolls are concerned, then sent to my office. We took impression copies of them, and then remitted them as cash to the credit of the station.

Q. Mr. Miller, what next have you prepared for me in answer to my request made when you were on the stand yesterday?

A. I have only received the abstract book in which the waybills are entered up for the purpose of keeping an account of the revenues and freight charges.

Q. Have you obtained for me the particulars as to how many bales of cotton were unloaded at Westwego from the 1st of November?

A. No, sir; I haven't got that yet; but I have the particulars as to what steamers we delivered cotton to during the week prior to the fire.

54 Q. Please let me have that.

A. This is what I term a berthing report—a report made from the Westwego office to my office daily of the vessels at the wharves up there. The others that I have date from November 5th, and cover each day up to and including November 11th.

Q. These berthing reports cover the hours of 7, 12 and 6 p. m., on each of the days they purport to give the particulars of?

A. Yes, sir.

The berthing reports are produced, offered in evidence as plaintiff's exhibits, marked 17 to 23, inclusive, and made part hereof. (Not printed.)

The first column indicates the grain wharf; then there are two columns headed "1" and "2," which indicate the two cotton

wharves, cotton wharf No. 1 and cotton wharf No. 2. Cotton wharf No. 1 was the wharf downstream towards the elevator; the shed was upon the wharf. No. 1 wharf contained No. 1 shed. There was no break in the line of the wharf along the river front; it was all one continuous wharf, so far as the cotton wharf was concerned. The grain wharf ran up and connected with the cotton wharf at the lower end of the cotton wharf. The cotton was all upon one continuous wharf, but divided arbitrarily into Nos. 1 and 2 in accordance with the sheds. The report of November 5th shows that on that day there were loading at No. 1 cotton wharf the steamship "Hajeen," bound for Bremen, on account of the Elder-Dempster line; and at cotton wharf No. 2 the steamship "Straits of Magellan" was loading. The figures "total 2,994," concerning the "Hajeen," mean that up to and including the 5th of November we delivered to the steamship "Hajeen" 2,994 bales of cotton, and 1,908 bales of cotton to the steamship "Straits of Magellan." The report of the 6th shows the loading of these steamships, so far as the cotton wharf is concerned. And 55 the report of the 7th shows that the "Hajeen" finished loading at 11 a. m., and had taken up to that date 4,729 bales. The report of November 7 shows that the steamship "Electrician," for Liverpool, on account of Harrison & Company, dropped down to No. 1 wharf at 12 noon. The report shows that the "Electrician" and "Straits of Magellan" were loading at No. 1 and No. 2 wharf in the latter part of the 7th of November. The report for the 8th of November shows that the "Straits of Magellan" left at 9 a. m. on the 8th of November, having taken 2,997 bales; and that the "Electrician" was still loading on the 8th of November. It also shows that the steamship "Malabar" came to No. 1 wharf on the 8th of November at 1 p. m. for cotton-seed cake. The report of the 9th of November shows that the "Malabar" dropped back to the elevator at 2 p. m.—couldn't load—and that the "Electrician" was still loading and left at 12.30 p. m., having taken then 2,413 bales.

The report of the 10th of November shows the steamship "Malabar" loading at No. 1 cotton dock and the "Elberfeld" arriving at No. 2 cotton dock, and loading cotton-seed meal and cotton-seed cake. The report of November 11th shows the "Malabar" moved to the elevator for a tug to make water, and the "Elberfeld" was still loading cotton meal, and the "Malabar" returned at 6 p. m. for cotton-seed cake on account Steinhardt & Company. I have no report of the 12th. I don't imagine it was made. I have no record of it. I judge, on account of the fire, that things got confused.

Q. What was the next thing I asked you to ascertain for me?

A. I have the original bills of lading, with data.

Q. Please produce them.

A. The cotton book at Westwego has been found, so my office telephoned me. It is at Westwego, and will be produced, and they are instructed to bring it down first thing tomorrow morning.

56 Q. Now, Mr. Miller, I show you plaintiff's exhibit, which is marked for identification, "No. 4," being the bill of lading

I called your attention to yesterday, dated at Bonham, Texas, on the 15th of October. Will you be good enough to tell me when the cotton mentioned in that bill of lading arrived at Westwego, and explain to me the system by which you check your account of arrivals?

A. I will have to refer now to the car-record book. (The witness, after referring to the car-record book, says :) I have here the waybills from Bonham, Texas, covering the cotton. Bonham bill of lading No. 35, which was issued for 200 bales. These waybills accompanied the cars and the cotton into Westwego. They are eleven in number. Referring to the eleven waybills, I ascertain that one bale of cotton marked "O. X. F./O.," 15 bales of cotton marked "J. A. X. O." reached Westwego in T. P. car No. 6506. In order to find out the date at which T. P. car No. 6506 reached Westwego I am obliged to look into what we call the "car record" book, and to hunt over that to find the number of the car. I find further that 50 bales marked "O. X. F. O." were received at Westwego in T. P. car No. 6120. I find further that 16 bales marked "T. C. U. P." arrived at Westwego on T. & P. car No. 6293. I find furthermore that 49 bales marked "T. C. U. P." in T. & P. car No. 16 reached Westwego; also that 50 bales marked "T. C. U. P." reached Westwego in T. & P. car No. 6564. I find that 16 bales marked "S. A. B. O.," and three bales marked "T. C. U. P." reached Westwego in T. & P. car No. 6506. That completes the 200 bales. In order to find the date of the arrival of any one of these cars, I look into this car-record book. The first car mentioned, T. & P. 6506, arrived at Westwego October 24th, 1894; the next one mentioned, 6120, arrived at Westwego October 23, 1894; the next one, No. 6293, arrived at Westwego October 23, 1894; T. & P. car No. 16 arrived at Westwego October 22, 1894; T. & P. car No. 6564 arrived at Westwego October 22, 1894. If a shipper of cotton had come to me on the 25th of

57 October, 1894, and asked me whether his cotton shown on this bill of lading had arrived at Westwego, the method which I have indicated would have been taken to ascertain whether or not his cotton had arrived at Westwego. I am not sure, when Westwego transmitted these waybills to my office, whether it sent with these bills of lading a letter of transmittal, showing the train and date of arrival at Westwego. If Westwego did not and if the cotton had not been unloaded, even though it were at Westwego, the waybills in my office would show that it had arrived at Westwego, and if we had this other data as to train and date we could give the exact date. Under the condition that I have mentioned we would have to go through all the hunt that we have lately gone through in order to ascertain the date of arrival. If the consignee insisted on knowing the exact date it came in there we would have called on Westwego, and the advice we had from Westwego would show that; we would have to ask Westwego as to the date it arrived. During October and November, 1894, I suppose, twenty-five or thirty thousand bales of cotton arrived at Westwego, and we had thousands of waybills covering this cotton, and every day or two we had one of these sheets in the car record book,

Exhibit No. 9, giving the numbers of the cars. If a shipper had asked if any of his cotton had gone forward we would have been able to tell that from our office record if the cotton had gone forward. We obtain from the steamship agent after the cotton goes forward the master's receipts. It is unusual, however, for a shipper to make inquiry at my office as to cotton in transit; through cotton. In the case of a New Orleans shipper who wanted to know about his cotton, he could find out either by the steamship agent or by asking my office. The first thing that would be consulted if he asked my office would probably be the waybill. The record that we would consult, if he wished to know whether it went forward on the ship, would be the record of what was delivered to that ship. We received what was called a "mate's receipt" from the mate of the steamer for each particular lot of cotton. I am not sure whether the Westwego office kept anything else or not. I am not sure that this cotton book we will have here tomorrow shows the steamer on which that cotton was shipped aboard. We had a system of notifying the steamship company when any particular lot of cotton had arrived. We kept the steamship company fully advised of the amount of cotton on hand ready for delivery. I do not think we had any particular correspondence with the agents of the Elder-Dempster line on that subject. We transmitted to the various steamship agents what we called "transfers," containing a full description of the cotton, giving the bill of lading reference and the contract reference, and with each batch of those transfers we sent a letter of transmittal. We have that.

Q. Please show me where you made any reference to any of the cotton mentioned in bill of lading No. 35, Plaintiff's Exhibit No. 4.

A. Our record is not entirely complete as to the original transfers. I know that some of these transfers are missing. I understood from my chief cotton clerk that he had a memorandum attached to these documents showing what was missing. Those that are missing we have impression copies of, and I have here some original transfers, but don't find any covering this particular lot of cotton. I show you a sample of transfer sheet, which I call transfer sheet No. 2070, form 1108, which is marked "Plaintiff's Exhibit No. 24." This is an original transfer sheet that we sent to Elder Dempster & Company. I have not the date here on which we sent that particular sheet, but the letter book will show. The letter book gives reference to the transfer-sheet numbers. I have not the letter book here. The original transfer sheet was sent to Elder Dempster & Company. After the fire, in fact, the night of the fire, we sent down to the steamship offices to get what transfer sheets they held, to have them returned to us, and we obtained some that night from some of the offices, but I believe the office of Elder Dempster & Company was closed when we got there, and we either sent down a man the next day or we communicated with Elder Dempster & Company and they sent them up to us. We sent around to the steamship companies to get back these papers in order to enable us to work up our records and ascertain and locate the cotton that was burned, etc., in order to facilitate matters. We did not send to the steam-

ship companies any other class or kind or character of notice than this, which is called the transfer sheet. If a shipper made inquiry at New Orleans as to whether his cotton had gone forward to Liverpool, we might have to look at the mate's receipt, which would depend on the lapse of time before the shipper made the inquiry.

Q. This cotton that arrived on this first bill of lading on the 24th of October, which is the last date that any of it arrived at Westwego, how much of it was burned in the fire?

A. If it was on the wharf, it was all burned. According to the record here and the notations on the billing, it was all burned; all of the 200 bales. I do not recognize the notations on those 11 waybills which you mark from No. 25 to No. 35 inclusive. The marks were made long subsequent to the fire. The book here ought to show similar information to that. The book which I produce this morning, and which was marked for identification "No. 36," has entered up in it contracts with the steamship agents. These contracts are usually numbered consecutively. That contract No. 44 is the one that these 11 waybills figure is covered by that Bonham bill of lading No. 35. As the cotton arrived covered by the respective contracts, and was entered up in this book—the bill of lading reference was posted up in the book. For instance, Bonham bill of lading No. 35 appears as entered on page 90 of the book, and the entry

60 is as follows: Date of bill of lading, October 15th; bill of lading No. 35, issued at Bonham. The number of bales covered by that bill of lading was 200, with the various marks. The consignor was Castner & Company; the consignees, Newell & Company. The record shows under the column disposition of bill of lading, there is a ditto mark under the "M. R." for "master's receipt." That ditto mark is evidently an error, for the reason that the cotton, being burned, there would have been no master's receipt issued. I cannot say when the record on page 90 of this record was made, nor by whom it was made, because I do not recognize the handwriting. I did not keep this book, and I don't know who did. It was kept at my office in New Orleans.

Q. Mr. Miller, with the bills of lading, your car-record book, your contract book and your waybills before you, you are not able to tell whether any of this cotton was burned at Westwego?

A. I have just shown from the waybills that the 200 bales were burned there.

Q. You show me from page 90 of this book that you have master's receipts for them. Now which is true?

A. I judge the notations on the bills of lading. It would surprise me to find that neither was true. We were in the habit of sending to the steamship company, and we would send them what is termed the ship's bill of lading; that is, a copy of the original bills of lading issued.

Copies of the original bills of lading were made out at the shipping point and sent to my office. I retained one and sent the steamship agents the other. We probably did send the ship's bill of lading for the 200 bales of cotton mentioned in the bill of lading No. 35, but I cannot say as to that. I do not know whether we kept

any record of that or not. As a rule, if the ship's agents do not receive all of the ship's copies of bills of lading by the time the steamer is ready to sail, they call on us for them.

Q. That adds another complication. How did you know whether they had all the ship's bills of lading?

A. They know what cotton the ship takes delivery of. We  
61 send them attached to the bill of lading a master's receipt to be signed. The master's receipts are signed after the steamship people take the cotton aboard the vessel. We send them receipts to be signed then. The receipts are made out in my office in New Orleans and sent down to the steamship company's office to be signed.

Q. From what material do you make out your mate's receipts?

A. The master's receipts; the steamship agents furnish a blank form—a sort of bill-of-lading form. We fill out those blanks from the bills of lading. We get the reference covering the cotton from the bills of lading.

Q. Now, Mr. Miller, is not this subject a little confused in your mind?

A. No, sir.

Q. I wish you would state it to me. It is in mine. Tell me how you knew on, say, the 10th of November, whether any of this cotton, the 200 bales mentioned in Plaintiff's Exhibit No. 4, had been shipped?

A. All that I know and all that I am going by in stating that it had not been shipped, but burned, is the notation on those waybills.

Q. But that was after the fire. I am speaking about the 10th of November.

A. Well, as a matter of course, if it had been shipped it couldn't have been burned.

Q. Place yourself back to the 10th of November, and before the fire, and tell me how, on the 10th of November, you would know if anybody inquired whether any of those 200 bales of cotton mentioned in this Plaintiff's Exhibit No. 4 had been shipped or not.

A. The proper course for that would have been to have looked up, first, to see if the cotton had arrived; after determining that, then to look through the records to see whether it had been shipped. I do not know whether this foreign contract book said on November  
10th that this cotton had all been shipped or not. I cannot tell as to  
when that entry regarding the master's receipts was made  
62 on page 90. There are various other records that could have been consulted independently of this book. We might have consulted the mate's receipts of the steamship to see if the cotton had been delivered to the steamer. The mate's receipts would have been the most reliable data.

Q. You mean to say you would look through your file of notes, receipts, of which I presume you have thousands, in order to ascertain whether this cotton had been shipped?

A. That would have been one way to have gotten at it. If I had looked at page 90 of the foreign contract book, and that book on



that date was as it is now, the indications would be that a master's receipt had been issued for this cotton. I can't tell from anything I have here whether the master's receipt was in fact issued or not for this cotton. I do not know from what particular data or record the indorsement "burned at Westwego" was made on the way-bill. I do not know who made it. I do not recall any specific instructions which I gave as to ascertaining what cotton was burned at Westwego. I did not work up the matter of ascertaining what cotton was burned at Westwego at all. Several of the clerks I had did this. One of them was Mr. Bynum, who was chief clerk at that time. He is now connected with the Illinois Central, I think. His name is E. A. Bynum. He left our employment probably in the spring or summer of 1895. Mr. Pierpont was also engaged in this work. He is still with us. Mr. Lonegon was also engaged on it; that is all, I think, the principal men that worked it up. From the records I have here at this time, I cannot tell from what sources those entries on the waybill, "burned at Westwego" were made. I do not know why my book is wrong, if it is wrong. It would surprise me to learn that both the book and the waybill were wrong.

Q. I asked you to prepare some other matters for me. It seems we have gone as far as we can with this.

A. You asked me to bring you the contract covering Bonham bill of lading No. 35. The contract is No. 44 and I produce that document, which is as follows:

63

*"Original.**"Form # 2370.*

Texas &amp; Pacific Railway Company.

*"NEW ORLEANS, LA., 9/29, 1894.**"Messrs. Elder, Dempster & Co., S. S. line :*

*"I have this day engaged 20,000 bales cotton for shipment by the Elder-Dempster Company's S. S. line for Liverpool, England, at 49.21 per 100 lbs. compressed cotton, delivery during months October, November, and December, 1894, as per conditions on the reverse side of this contract. Contract # 44. P. pro Elder-Dempster & Co., by M. & R. Warriner. Yours respectfully, C. G. Miller, agent T. & P. Railway Co."*

On the back of this sheet of paper is the following:

*"Elder Dempster & Co. agree to pay the Texas & Pacific railway any insurance claims presented by shippers that are in excess of 3 cents per bale over the recognized first-class insurance quotations. Elder Dempster & Co. further agree to pay the Texas & Pacific Railway Co., one-half of any insurance claims presented by shippers that may not be in excess of three cents per bale, it being understood that on claims presented for an amount in excess of three cents per bale, Elder Dempster and Co. are to pay Texas & Pacific railway the amount in excess of 3 cents per bale and one-half of the remaining three cents per bale."*



"The foregoing agreement only applies to cotton forwarded on chartered steamers, Elder Dempster & Co. agreeing to protect the Texas & Pacific railway against any claims whatever account excessive insurance on cotton transported on steamers belonging to Elder Dempster & Co. C. G. Miller, agt. Tex. & Pac. Ry. Co., New Orleans, La., Sept. 29th, 1894, p. pro. Elder Dempster & Co., M. & R. Warriner."

Q. Now, are there any other matters you are prepared to answer that I have inquired of?

A. You asked me as regards the messenger service between  
64 Westwego and New Orleans. The name of the messenger was Simons, a colored boy. Then I brought some books here, the in-bound freight account, which I mentioned a while ago.

Q. Tell me the course of business which the Texas and Pacific Railway Company followed with the Elder-Dempster Steamship Company concerning the shipments of cotton from New Orleans which had been carried by the railroad from points in Texas and brought to New Orleans.

A. Do you refer now to New Orleans proper or to Westwego?

Q. Did you make any distinction?

A. We made this distinction, that cotton for New Orleans proper was drayed to the ship's side, and the cotton brought into New Orleans at Westwego was placed on the wharf from the cars. The railroad company, in the first place, made certain contracts with the steamship companies or with steamship agents for carrying before the cotton would arrive.

Q. Mention the names of the various steamship agents with whom the Texas and Pacific Railway Company made the contracts for the season 1894-1895.

A. Very likely with every regular steamship agency here. There was the Harrison steamship line, which I knew of that we had contracts with, and the West India and Pacific steamship line, Elder-Dempster & Company, Hammond & Company, the French line or French commercial line—that line changed its name within the last few years, and I am not sure which name it was going under then; the steamship lines for which Miller, Meletta & Company are agents. The G. L. & S. or L. & H. lines were the other principal cotton lines, and there was the Hamburg-American Packet Company handled by the same agency. These are about all the lines that I am certain we had contracts with. I recollect the original contract which I produced the other day between the Texas and Pacific Railway Company and Elder, Dempster & Company. We should have the original contracts with these various lines that I have mentioned.

65 Q. I shall want to have you produce them.

A. Those contracts were not called "season contracts;" the only term we had was "contracts." We had no season contracts, only contracts for specific ports and places. In addition to these general contracts or this general contract which we had with Elder, Dempster & Company, we may have had other contracts

with Elder, Dempster & Company besides ; yes, we did have others besides contract No. 44. All these contracts with the other lines specified a rate of freight. Letters were not written to Elder, Dempster & Company for each additional contract ; the contracts were usually handled without any letters at all ; in fact it was customary to handle them out in duplicate on a regular printed form filled out in duplicate, one of which was signed by myself and given to Elder, Dempster & Company or the steamship company, and the other signed by them which was retained by myself. The next step towards the fulfillment of this general contract No. 44, or any one of the special contracts with Elder, Dempster & Company, taken by the railway company, would be, I presume, to have the cotton shipped in Texas. On the arrival of the cotton here it was unloaded, and after the cotton arrived the Texas and Pacific Company would furnish Elder, Dempster & Company next a notice of the arrival. This notice of arrival was in the form of a transfer slip such as I produced the other day.

Q. In no other form ? They are always in the form of transfer slips ?

A. As to each individual lot, yes, sir. That was our regular recognized course.

Q. Did any other paper pass between the Texas and Pacific Railway Company and the Elder-Dempster S. S. Co. between the making of the contract and the forwarding by the railway company to the Elder-Dempster S. S. Company than the transfer slips ?

A. In sending them those transfer sheets we wrote them a regular letter of transmittal with the transfer sheets. This letter was not on a printed form, but it was a regular letter.

66 Q. What was the next step after you sent the transfer slip to the steamship company ?

A. Then it remained for the steamship company to take delivery of the cotton, send a steamer to Westwego and get it. Usually the transfers would be returned to us, either indorsed on the face of the transfer by the steamship agents to deliver the cotton to a certain steamer, or a letter of transmittal returning the transfers. Either practice was in effect.

The practice was for the steamship company to return the transfer slips which had been sent to them with certain particulars filled in by the steamship company, indicating what lots of cotton the steamship company was ready to take delivery of.

The next step was for the steamer to go to Westwego and take charge of the cotton.

Q. Before the arrival of the steamship at the dock at Westwego was there any paper which passed between the steamship company and the railway company, or the railway company and the steamship company, than the papers which you have now described ?

A. There would be nothing in the way of affecting the delivery of the cotton.

Q. Irrespective of what you may think the effect of this paper would be, I am asking you, Mr. Miller, whether any other paper would pass between the steamship company and the railway com-

pany prior to the time of the arrival of the steamship at the dock at Westwego, than the papers which you have described.

A. I was going on to explain that the ship's copies of the bills of lading, if they reach my office prior to the time that the steamer went to the dock in a number of cases those bills of lading were sent to the steamship companies. Wherever I have spoken in any part of my examination of "ship's copies" of bills of lading, I mean duplicates of the bills of lading which were issued by the agents of the railway company at the various shipping points in Texas.

67 There was no other class of paper that passed before the arrival of the steamship at the dock, than the papers to which I have testified. Upon the arrival of the vessel at the dock the employés of the railway company at Westwego, in company with some one of the ship's employés—the mate probably—would go around and count the various lots of cotton that were there and the mate would give us what is termed a "mate's receipt" for that cotton before loading it on the vessel.

Q. At or shortly prior to the arrival of the steamship the cotton designed for that steamship would be brought out on the dock by the railway employés, would it not?

A. Not necessarily; that would depend upon where the cotton was; and in a number of instances the mate of the steamer would receipt to us for it, and the steamship labor would truck the cotton from where we had it on the dock to the vessel.

Q. Prior to the arrival of the steamship at the dock did you ever receive any document from the ship?

A. No, sir.

Q. Having received the mate's receipt for the cotton thus counted by the mates, destined for shipment on the steamship, what would you do with those mate's receipts?

A. The mate's receipts, I think, were taken in duplicate. The original mate's receipt was sent from the Westwego office to the freight office—my office at the foot of Thalia street—and duplicates retained at Westwego. The mate's receipts received at my office in New Orleans would be filed there, with the possible exception of the steamship agency of Miller, Melletta & Co. They years ago and possibly were doing it at that time, established a new rule that we would surrender mate's receipts to them before they would issue master's receipts; but they were about the only agency doing that at that time. After the cotton was placed aboard the vessel we would receive master's receipts. As a rule all cotton receipted for by the ship goes aboard the vessel that is loading at the time; but there are exceptions to that rule. We sent a copy of the mate's receipt to the steamship company and received in exchange

68 the master's receipts only in connection with the one firm of Miller, Melletta & Company. We did not receive what are called "ocean" bills of lading from Elder, Dempster & Company at any time that I recall; ocean bills of lading—master's receipts, as they are called, and which are recognized as such—it wasn't customary for railroads to receive. Those were usually given to the shipper in case the shipper preferred what is called an ocean bill of

lading to a master's receipt. The mate's receipt was the prime evidence that the railway company had of a delivery on board of a ship of any cotton. The railway company had nothing else than the mate's receipt, unless it was the master's receipt, and that was secondary evidence where the mate's receipts were not surrendered.

Q. What period of time usually elapsed between the receipt by the railway company of the transfer slips from the steamship company and the arrival of the steamer at the dock at Westwego?

A. Well, that would all depend. At times the transfer slips were returned to us before the steamer would arrive. At other times the steamer would be in the river at some city wharf expecting to go to Westwego the next day or several days after. At other times the slips were probably returned the same day the steamer went to Westwego. The object of the steamship company returning to us the transfer slips was to designate the quantity of cotton they might want aboard a steamer and what particular cotton, at times. I have now described the course of business that was usually followed at Westwego during the months of October and November, 1894, as to your specific questions. I do not recollect receiving shortly prior to November 12, 1894, a letter from the Elder-Dempster Steamship Company in relation to the general method of the railway company handling cotton at Westwego. I will look among our files and give you any letter that we received from the Elder-Dempster Steamship Company during the month of November, prior to November 13th, 1894. Ordinarily, immediately

69 after the return of the transfer slips by the steamship company to the railway company, the railway company would make out an order on the Westwego office to deliver such cotton as the steamship agents ordered. It sometimes happened that when a steamship arrived it took different cotton than that which was mentioned on the transfer slip; we possibly had some cases where the steamship did not take all the cotton that was mentioned on the transfer slip. I do not recollect having any correspondence with the steamship companies shortly after November 12, 1894, in relation to a new contract.

After the receipt from the steamship company of these transfer slips with marks of lots of cotton upon them, if it should be necessary to get the cotton out, that would be attended to by some of the railway employees at Westwego, as to locating the cotton and getting it out. It was not necessary to get it out at all times; it was on the wharf; it was all over the wharf; it was usually stored inside of the railway track, toward the land. I do not know that I issued any specific order to any one in respect to getting out that cotton. It was understood we would get out cotton when necessary to do it. By getting out cotton, I mean trucking it from where it was originally stored on the wharf out, say, in front or near enough in front to enable the steamship people to get it out without having to go around other piles of cotton. When that was done at all, it was usually done after the receipt of the transfer slip from the steamship company. Whether it was done at all depended on the location of

the cotton on the wharf. In some instances it was done and in some instances it was not done.

Q. Do you mean that before the receipt of the transfer slips from the steamship company the cotton that was destined for a steamer was put between the wharf and the river?

A. No, sir; not necessarily. I simply mean that if cotton  
70 which Elder, Dempster and Company, for instance, sent a steamer there to get, if it was where they could get at that cotton, if there was no obstruction of any consequence between where this cotton was stored that they went there to get and the ship's side, that, in that case, we had nothing to do in getting it out; they took it from where it was located. It was not necessarily gotten out by the employees of the railway company in the majority of instances after the receipt of the transfer slips from the steamship company. I do not think it was done in the majority of instances. I could not say how much of my time I spend at Westwego, probably not on the average an hour a day throughout the season. Sometimes, but not at that period, it would happen that I was not there for a week at a time. Take twenty days prior to November 12, 1894, I was probably there six or seven times in that period, maybe oftener. I could not say what was the average duration of my visits during that time. It may have ranged anywhere from half an hour or an hour up to three or four hours. I do not recollect specifically spending three or four hours at Westwego at any time in the three weeks prior to November 12, 1894. I was at that time a very busy man; that was at the height of the cotton season; and during that cotton season a very large crop had been produced; the railway company was receiving a very large number of bales of cotton at that time. I have not figured up how many bales of cotton were unloaded from the cars at Westwego between the first day of September and the 12th day of November, 1894. The request as to that was made from the 1st to the 12th of November, and I have that here.

Q. State to me how many between the 1st and 12th of November.

A. I can give it to you as to dates.

Q. Yes, and will you add to your answer stating that you are now refreshing your recollection and referring to whatever you have before you; what do you call that?

71 A. These are tissue copies of daily reports made to me by the Westwego office. On November 1, 1894, we unloaded on the wharf 1,692 bales of cotton. The report which I now produce, and which runs from November 1st to the 12th of November, inclusive, gives all the information which I received at that time on the subject. The daily report of the 12th of November, 1894, shows that there were on that date on hand in cars at last report 145 cars carrying 5,245 bales of cotton; and there were received on November 12th 65 cars with 2,760 bales in them. There were on hand at the close of the day's business, apparently, from that, 210 cars; there were none unloaded on the 12th; and there were on hand that night 206 cars with 8,000 bales in them; there were on the dock

that night 20,879 bales; there were none loaded on the steamship that day; the total receipts "this season" were 64,316 bales, and the total delivered on steamships 34,764 bales. The reference at the end of these daily reports concerning insurance reports is to the number of bales on hand consigned via each particular line. It is called an insurance report for the reason that we telegraph our auditor in Dallas, Texas, each day as to the number of bales of cotton on hand; I do not know for what purpose; I have never heard; I presume it had some connection with the matter of insurance, I do not know; the report that was sent on November 12 to our auditor at Dallas, Texas, was sent from the Westwego office; I don't know whether or not I have a letter-press copy of it; I have here the letter-press copy book that we kept at Westwego; that report being a telegraph report, I do not know that it would be copied in my office record book.

Q. Just let me examine your letter book.

Mr. TAGGART: No, we won't let you examine the letter book. Look, Mr. Miller, and see if there is any on the 12th.

(The WITNESS:) That would not ordinarily be kept here, 72 I should not imagine; that was in the nature of a telegram, and the telegraph office was located up in the elevator office. I expect, however, that this is it.

Mr. CLEVELAND: Let me look at it.

Q. You produce letter book, which will be marked for identification "Plaintiff's Exhibit 49," and you refer me to page 310 of this letter book?

A. Yes, sir.

Q. Which reads: "C. G. Miller, New Orleans, La., Westwego office, 11/12/94, R. Fenby, Dallas, on wharf tonight 250 bales local cotton; 21,448 bales through cotton; 125 sacks C/S cake;" and these are your initials?

A. Yes, sir; it is signed by Mr. Figures. That is a sample of the telegrams that were sent daily by the Westwego office to Mr. Fenby at Dallas, so that he knew exactly what cotton we had on hand every day. Letter-press impression of the daily report of the 10th of November was designated as a cotton report, and it is as follows: "On hand in cars last report, 114 cars, 4,164 B/C; received today, 18 cars, 589 B/C; unloaded today, 8 cars, 274 B/C; on hand tonight, 124 cars, 4,479 B/C; delivered to steamships today, none; total receipts this season, 60,765 bales; total receipts last season, 45,033 bales; total increase this season, 15,732; total delivered steamships this season, 34,764; forwarded to New Orleans, 668 bales. Insurance report: steamship, 9; destination, on the cars." Immediately after the words "on the cars" it is indistinct; but it looks more like 125 cars than anything else. The numbers under the heading "Insurance reports" are so blurred that I cannot read them. The names of the steamship lines are in the same order as the report of November 12. The destination in the same order as on November 12th, and under the heading "On cars" opposite "Havre," 4,081; opposite "Liverpool," 314 bales; opposite "Harrison line, Liver



73 pool," nothing; opposite "E. D. line, Bremen," 84 bales, and local, 250. The report of November 12, 1894, states that we unloaded no cars on that day; I know nothing to the contrary of that. The report of November 10th says we only unloaded eight cars on November 10th, which was Saturday; I know nothing to the contrary of that.

Q. Mr. Miller, what is the first subject that you have examined and prepared for me?

A. You wished to know the number of bales delivered to each steamer from November 1st up to the 12th. This appears on the second sheet of these daily reports that I have produced. I have the cotton book here that we kept at Westwego and the data here from start to finish respecting the 200 bales of cotton under Bonham bill of lading 35; the two large books that are now here I call the cotton books at Westwego.

This cotton book, which will be called No. 1, is labeled on the outside "Record, through cotton shipments, Texas & Pacific Railway Company," covering Havre and Liverpool, and is marked for identification "Pl'f Ex. No. 50." The system under which this book was kept is this: On the arrival of the waybills accompanying the cotton, the billing was entered up in this book. The first bill of lading which is shown me, No. 35, appears, as to the entries relating to it, in Book No. 2, marked for identification "Pl'f Ex. No. 51." On folio 6 appear the following entries which relate to this bill of lading. In the first column headed "Date" is the entry showing the arrival of the cotton covered by Bonham B/L No. 35, at Westwego. In the column headed "Waybill date" shows the date of the billing of the waybills issued at Bonham, Texas. In the column under the heading of "Waybills" shows the numbers of those same waybills. Under the heading of "Initial" shows the initials of the cars carrying the cotton. In the column under the heading "Car numbers" shows the number of those same cars. In the column under the heading "Where from and consignor" shows the

74 point of origin of the cotton. In the column under the heading "Consignee and destination" shows the consignee and destination of the cotton. Column under the heading "Steamship line, vessel" shows the steamship line via which the cotton was to go; and column under heading "B/L No.," shows the numbers of bills of lading issued to cover the cotton in question. In the column under heading of "Bales of cotton," shows the number of bales covered by each bill of lading. In the column heading of "Date of sailing," that is blank. The column under the heading "B/C" (meaning bales of cotton), shows the number of bales of cotton of the respective marks. In column headed "Marks," shows the marks of those same bales. Column under the heading of "Notice," shows the post number nearest which the cotton is located after being unloaded. Column under the heading of "Exceptions" is blank. The column under the heading "Pro. No." (which means "progressive number") represents the number of the skeletons taken from the original billing accompanying the cotton. So we have the column under the general head of "Delivery," subdivided into



three headings—number of bales signed for, dates and vessels. All these three columns, under the general column of "Delivery," are blank, except as filled in with red ink after the fire, showing that the 200 bales of cotton covered on Bonham bill of lading No. 35, were burned on the wharf. Then also, in the column headed "Remarks," there are no remarks opposite this lot of cotton. As to each lot of cotton received at Westwego, there should be the same particulars in one or the other of these cotton books, Nos. 50 and 51. By "Pro. No." I mean "progressive number," it is a term we use indicating a consecutive number of any particular lot of documents, commencing, say, at No. 1, and numbering consecutively from that up. Under the general column headed "Delivery," where there are these three subsidiary columns, first is the number of bales of cotton signed for; that means the number of bales of cotton signed for by the steamer; the next column headed "Date" shows the date on which those mate's receipts were signed; and the column headed "Vessel," the vessel that took the cotton. I have not made up a general statement as to each one of these lots of cotton involved in these 43 suits; but I have the waybills and transfers and skeletons covering each lot; I produce the waybills for this bill of lading No. 35; I don't remember whether we have the transfers for this bill of lading.

Q. We will follow this general lot of cotton through all its ramifications.

A. The papers which I produce, and which are numbers 869, 870, 871, 872, 932, 933, 940, 1031, 1032, 1033 and 1034, are used as skeleton waybills; they are all skeletons made from the original waybills at Westwego. The object of making those is to enable the check clerks to have documents from which to check cotton out of the cars; the particulars are then entered in the cotton book. The skeleton waybills are then turned over to the check clerks for use in checking cotton from cars discharged at the time as they get ready to unload the cotton. After the cotton is checked out of the cars the check clerks sign them, sign their name, placing "O K" on each above their name, and show the post number near which the cotton is posted or placed on the wharf. Taking up Exhibit No. 52, it shows that 25 bales of cotton marked "P. C. U. P." were placed under the direction of Webb near post 28 and checked by Webb "O K." The skeleton waybill is made in the office by some of the clerical force before the check clerks get it.

Q. How is that? On this exhibit, judging from the writing, it was made out after the cotton was placed at post 28?

A. No, sir.

Q. Then the words on this Plaintiff's Exhibit No. 52, "O K," "Webb," were placed on this after it had been made out by the clerk in the office at Westwego?

76 A. Yes, sir.

Q. And after it had been checked by Mr. Webb from the car?

A. Yes, sir.

Q. And was it all copied at one time?

A. This particular waybill, I think, was all copied at one time. It has that appearance. In some instances, though, it may have been copied before getting to the check clerk. In that case the check clerk's "O K" would not have been copied at all, and this appears to have been copied. After the check clerk had checked this cotton out, the skeleton waybills were turned in again to the Westwego office, and forwarded by that office down to my office at the foot of Thalia street, New Orleans, and that is where they remained. I do not find that we have the original transfer sheets for these 200 bales, but we have the impression copies of them.

Q. Please produce those.

A. The first is transfer No. 1197, showing practically about the same reference as is shown by the original waybill that accompanies the cotton. In my office at New Orleans there were made out transfers. These are contained in a book which is called "Foreign Cotton Transfers, No. 936 to 1947, No. 2, 1894-1895." It is a book of yellow tissue sheets not paged, and these transfer sheets relating to this cotton are as follows: 1197 and 1198, and also Nos. 1320, 1199, 1200, 1265, 1266, 1308, 1317, 1318, and 1319, contained on different pages of this transfer book. Transfer No. 1197 reads as follows: "Elder, Dempster & Company. The Texas and Pacific Railway Company. Memorandum of freight transferred and delivered to the railway Westwego station this 23d day of October, 1894, in good order and condition, noted to be forwarded as indicated hereunder." Then in the column under the general head of "Waybill" and under the specific heading of "Date" is shown the following dates, "10-15," and below that "10-18." Under the  
 77 same general heading and under the specific heading of "Number" shows the number "212," which is the waybill number, and No. 349 also the waybill number. In the column headed "Car No. & initial," shows No. "6564, T. & P.," which is car number and initial. In the column headed "Expense bill No." shows Nos. "8008 and 8010." In the column under the heading of "Where from and shippers," shows "Bonham, C. & Co., Ho. Grove" (for "Honey Grove"). In a circle in the column "Transfer No." shows "No. 869," which is the Westwego pro. number as well as the skeleton number. In column under the heading of "Consignee and destination" is shown "O. N." meaning order to notify Newell & Clayton, Liverpool, England. In the column under the heading of "Articles," is shown 25 B/C "P. C. U. P.," B/L No. 35, 200, contract 44." In the column under the heading of "Weight" is shown weight 12,500 lbs. In the column under the general heading of "Rates" and under the specific heading of "Through" is shown 51.79; under that "10 cents" and under that "49.21" making 1.11 through rate. In the column headed "Freight" is shown \$64.74, which is the inland proportion of the revenue for transporting the shipment. Under the column headed "Charges" is shown \$12.50, which is the advance or compress charge paid out and covered by the waybill previously described as being No. 349 from Honey Grove. In the column under the heading "Total to pay" appears the amount \$77.24, which is the

total inland charges following the shipment, for compressing and transportation. In the column "Prepaid" nothing.

Q. What is this division of rate—51.79—10—49.21?

A. 51.79 is the railroad's proportion of the through rate 111; 10 is the compress charges of 10 cents per hundred, and 49.21 is the steamship proportion of the through rate—the ocean proportion of the through rate of 111; and the 64.74 is made up of the revenue of the inland carrier, that is, the railroad carrier, for transportation on the basis of 51.79 for 100 pounds. There is nothing on any

78 of these transfer sheets to show when they were sent, if ever, to the steamship company.

Q. You can't tell me, then, whether there were ever sent to the steamship company any of the transfer sheets relating to this 200 bales?

A. I can't tell you from these sheets, but I have other documents to show that.

Q. Show me those other documents, please?

A. By referring to a letter-press copy book, "Foreign cotton transfers to steamship agents, season of 1894-1895," unpagged, I find that on November 2, there were sent to Elder, Dempster & Company, at New Orleans, this and all the other transfer sheets which accompanied this lot of cotton of 200 bales: "The Texas & Pacific railway; office of freight agent; New Orleans, November 2, 1894; Elder, Dempster & Co., city; below please find transfer of cotton consigned via your line to Liverpool, England;" and this letter consists of four letter-press pages and is signed, "Yours truly, C. G. Miller, freight agent, Shelly," and includes all the transfers which I have mentioned; namely, 1197, 1198, 1199, 1200, 1265, 1266, 1308, 1317, 1318, 1319 and 1320, as well as various other transfers. (The book containing transfer sheets is marked "Plaintiff's Exhibit No. 63." The transmittal letter book is marked "No. 64." The letter of Nov. 2, 1894, is marked "No. 65). The waybills, skeleton waybills and transfer sheets and letter of transmittal complete the documents in relation to this 200 bales of cotton, with the addition of the ship's copies of the bills of lading. I produce now what we call our ship's copy of the bill of lading. The record also leads through the cotton book in the New Orleans office, the same book I had down here the other day. I am prepared to show you a complete record also from that book. I refer to Plaintiff's Exhibit No. 36, the book which was kept in the office at New Orleans. On page 90 thereof are entries which relate to this 200 bales of cotton. I read entries on one side of that book the other day. I have found that the entry

79 of "M. R.," meaning "master's receipt," in the column headed "Disposition, Bs/L," on page 90 of this book, was occasioned by the practice of making up master's receipts after the receipt of the arrival at my office from the ship's copies of the through bills of lading, the entry of "master's receipts" this referred to being made on page 90 to indicate that the master's receipt had been made up from the ship's copies of bills of lading covering the 200 bales of cotton from Bonham, B/L No. 35, Contract 44, the custom being to make up the master's receipts and send them with the ship's copy

of the bill of lading to the steamship agents, without regard to the time of delivery of the cotton, or whether the cotton is delivered or not. In a number of instances prior to the delivery of the cotton, as was the case in connection with these 200 bales, on pages following page 90, will be found other entries as to records and disposition of these 200 bales. This column headed in red ink "T. R. F." means transfer sheet, and the number in that column below that heading gives the numbers of such transfers. For instance, on page 93 I find transfer No. 1198—that is, I find transfer sheet No. 1198—which covers 25 bales, marked "P. C. U. P.," from the lot of 200 from Bonham. In the column headed "Number and date of notice" appears the entry of October 23d, which indicates that a transfer sheet, No. 1198, was made out on October 23d. In the column under the heading "Name of vessel" appears the stamped endorsement "burned at Westwego, November 12th, 1894." Under the column headed "Date received," on page 93, it is blank. Also blank under column "Date served on steamship," "Date returned by steamship," "Name of vessel," original clerk—now "burned at Westwego, November 12, 1894." Also blank under the column headed "Notice, returned to New Orleans agent." My books contain the same character

80 other transfers, entries in the cotton book, entries in the contract foreign cotton book, and the same data with reference to other bills of lading involved in these transactions as I have stated with reference to bill No. 35. This indicates the system of handling the cotton. The master's receipts indicated on page 90 concerning this lot of cotton mentioned in the bill of lading No. 35 were never in fact signed by a master; they were simply blanks made up to suit some steamship which would arrive and take the cotton. I do not know where the master's receipts are which were made out for this lot of cotton. At that time they were in the hands of the steamship agents, sent there and retained. All these particulars were gone through with concerning this 200 bales under contract with the steamship company No. 44. Our ship's bill of lading which has been marked "66" has the name of J. M. Booth signed to it; he is shown there as agent of the Texas and Pacific Railway Company at Bonham, Texas. I do not know him to be such; I do not know the man. I know that the company had an agent by the name of J. M. Booth at Bonham, Texas. As to whether I was in the habit of receiving from time to time bills of lading so signed from Bonham, Texas, I will say that the bills of lading were not transmitted to me direct from the stations at which they were issued. The bills of lading reached me through our general freight office at Dallas, Texas. I was in the habit of receiving from our general freight office at Dallas, Texas, bills of lading signed by J. M. Booth, and dated at Bonham, Texas.

Q. Now, Mr. Miller, you recollect you were to prepare something else for me, were you?

A. The number of bales burned on the wharf; you wanted to know as to that.

Q. The book which you now produce and which is labeled "Texas

& Pacific Railway Company, Westwego, La., Nos. 1547, 1101, to 2347, 11/28/94," also "Statement of cotton burned in cars on wharf, November 12, 1894," is what?

81 A. That is a book of skeletons from June 14 to October 29, 1894 (marked "Plaintiff's Exhibit 68").

The book I now produce is a similar book; it contains copies of the skeletons from October 22, 1894, onwards.

Marked "Plaintiff's Exhibit No. 69."

I also produce book containing letter-press copies of numbers of transfer sheets, No. 1 to No. 935.

Marked "Plaintiff's Exhibit No. 70."

Also another book containing letter-press impressions of transfers Nos. 1948 to 2935.

Marked "Plaintiff's Exhibit No. 71."

I also produce another book containing record of ship's copies of bills of lading, marked on the outside, "Foreign cotton bills of lading, season 1894/1895."

Marked "Plaintiff's Ex. No. 72."

I also produce two memorandum records of transfers made, per this, by the cotton clerks at Westwego.

Marked Plaintiff's Exhibits # 73 & # 74.

I also produce a package of what we call "switch lists;" that is, conductors' lists, a printed form showing what cars each conductor left at Westwego junction. The switch list was left at Westwego junction. This list shows the date the cars were sent out, the train number that brought the cars in and the name of the conductor.

Marked "Plaintiff's Exhibit No. 75."

I have some letter books also that contain letters of various import, private affairs of the company that we would not like  
82 to have examined promiscuously. This is a letter book from January 16, 1894, to February 13, 1894.

Marked "Plaintiff's Exhibit No. 76."

There seems to have been some of our office letter books, from February to September, not brought down; I do not find them here. For instance, the last date shown here is February 13, 1895. The letter book between that date—February 13 and September 21—don't appear to be here. The first book I have here runs from September 21, 1894, to October 9, 1894.

Book marked "Plaintiff's Exhibit No. 77."

Then we have a letter book from October 10, 1894, to October 29, 1894.

Marked "Plaintiff's Exhibit No. 78."

Then from October 29 to November 17, 1894.

Marked "Plaintiff's Exhibit No. 79."

These letter books that I have produced are New Orleans letter books. We have a book in our cotton office at New Orleans from February 16, 1894, to December 28, 1894, which is a New Orleans letter book also.

Marked "Plaintiff's Exhibit No. 80."

We have claim letter book from November 8, 1894, to December 20, 1894.

Marked "Plaintiff's Exhibit No. 81."

Also claim letter book from December 18, 1894, to January 11, 1894.

Marked "Plaintiff's Exhibit No. 82."

Then we have an impression copy of orders gotten out at the New Orleans office on the Westwego office ordering certain cotton delivered to steamships at Westwego from September 27, 1893, to January 25, 1895.

Marked "Plaintiff's Exhibit No. 83."

This last letter book I have shown you, or the letter-press impression book, contains orders from our New Orleans office to the Westwego office to deliver certain cotton to steamships; the Westwego office was guided by the directions contained in these various letters, but not necessarily guided by them alone; there may have been other instructions not embodied in these orders; I do not know of any. It was the object of this book to keep a record of the orders that were sent out from our New Orleans office to the Westwego office, directing shipments of cotton, so far as orders contained in that particular book are concerned. We intended to have a record of every order.

Q. Have you had leisure since the morning session to search for that letter from Elder, Dempster & Company during the first 12 days of November, 1894?

A. No, sir.

Q. Please make a memorandum of that.

A. I would say in connection with this other correspondence that you referred to today, with steamship agents, as to a new form of contract of delivery, I am positive that we had no such correspondence, without digging through the letter books. I have been thinking of that considerably.

Q. Prior to November 12, 1894, how many bales of cotton under contract No. 44 had the Texas and Pacific shipped on steamers of the Elder, Dempster & Company line for, Liverpool, England—I mean during the months of October and November?

A. I don't recollect as to how many bales had been shipped.

Q. You have material here from which you will be able to answer.



84 A. Our contract book may show that. I have all of our contracts here which I was to prepare, and have looked them over to see whether there were, prior to November 12, any contracts where the delivery was in any other form than unrestricted, or as in form of contract No. 44, and I find no others.

Cross-examination by Mr. TAGGART:

A. I have selected all the contracts with the steamship companies relating to the cotton covered in these forty-three suits and for the period during which the cotton moved.

Q. In some of the contracts which are produced under the head and marked I noticed under the head of Delivery "Unrestricted to a certain date." Would these words be understood as fulfilled if the railroad company had the cotton on the wharf about that date?

A. Yes. That was the understanding where there was a restriction to a certain or particular date that the railroad company should have the cotton unloaded on the wharf at Westwego about that day.

Q. Now, Mr. Miller, have you these skeletons which were produced yesterday respecting this first case—I want to call your attention to one matter in connection therewith?

A. I have these skeletons, and produce them.

Q. I call your attention to the marks on skeleton No. 869 under the column "Weight, rate, charges," and ask you what those indicate they are.

A. They are the marks—check-marks—made by the check clerk; marks indicating that one bale of cotton was checked out of the car. Some of the clerks entered on check-slips marked in that way, and kept the account in that way. On some you find no check-marks, or find check-marks in different places. On No. 872 is "O K;" that is a check-mark. It was not absolutely necessary to have the check-mark put on the skeleton. It was simply different method of keeping tally adopted by the different clerks. In this first case  
85 of Newell & Clayton I have had selected all the waybills which relate to cotton claimed in that case, and I have had them checked to ascertain that they covered all the cotton.

The number of the waybills covering this case are as follows: Bonham to New Orleans, waybill No. 558, dated October 25, 1894; Bonham to New Orleans, waybill No. 560, dated October 25, 1894; Bonham to New Orleans, waybill No. 592, dated October 25, 1894; Bonham to New Orleans, waybill No. 593, dated October 25, 1894; and from the same place to same on the same date I have waybills Nos. 590, 559 and 589, respectively. I further have the following waybills Nos. 588, 587, 556, 557, from Bonham, Texas, to New Orleans, dated October 25. I have waybills Nos. 234, 233, 231, 230, 236, from Bonham to New Orleans, dated October 16, 1894. I have waybills Nos. 211, 210, 212 and 213, from Bonham, Texas, to New Orleans, dated October 15, 1894; then I have waybills Nos. 232 and 235, from Bonham, Texas, to New Orleans, dated October 16, 1894; I also have waybills Nos. 462 and 463, from Bonham, Texas, to New Orleans, dated October 23, 1894; also waybills 502 and 535,



from Bonham, Texas, dated October 24, 1894. These waybills give the cotton involved in this particular case.

Waybills referred to are offered in evidence and marked "Defendant's Exhibit Z, Nos. 1 to 26 inclusive," which are attached hereto and made a part hereof (Exhibit Z 1 is printed at p. 149 *post*. The remainder are not printed; see stipulation, p. 155).

In this suit of Newell & Clayton against the Texas and Pacific have you the skeletons that relate to the cotton involved in this suit?

A. I have, and produce them. These are the skeletons which were selected on the demand of the plaintiff.

Skeletons referred to offered in evidence by the defendant 86 and marked "Defendant's Exhibit Z, Nos. 27 to 53 inclusive" (Exhibit Z 27 is printed at p. 150 *post*. The remainder are not printed; see stipulation, p. 155).

Q. Now, Mr. Miller, have you the original transfers relating to this Newell & Clayton case?

A. I have the originals in some instances and in other instances tissue copies. They are papers which were produced on the notice of plaintiff's counsel. I can give you the number of the original transfers as far as I have them. I have transfer sheet No. 1789, to Elder, Dempster & Co., dated November 1st, 1894, and I have transfer sheet No. 1792, to Elder, Dempster & Co., dated November 1st, 1894; then I have transfer sheets 1801 and 1800, dated November 1st, 1894, to Elder, Dempster & Co.; transfer sheet 2101, dated November 5th, 1894, to Elder, Dempster & Co.; transfer sheets Nos. 1795 and 1797, dated November 1st, 1894, to Elder, Dempster & Co.; transfer sheet No. 1802, dated November 1st, 1894, to Elder, Dempster & Co.; transfer sheet No. 1730, dated October 30th, 1894, to Elder, Dempster & Co., and transfer sheets 2070 and 1682, to Elder, Dempster & Co., dated November 5th and October 30th, 1894, respectively. These are all the originals that I have.

The defendant offers in evidence the transfer sheets referred to, which are marked "Defendant's Exhibit Z, 54 to 64 inclusive." (Exhibit 54 is printed at p. 151, *post*. The remainder are not printed. See stipulation, p. 155.)

I have a memorandum of the numbers of the impression copies of those transfers relating to the cotton involved in this case which are missing. The numbers of such transfer sheets are as follows: 1197, 1320, 1198, 1199, 1200, 1265, 1266, 1308, 1317, 1318 and 1319, to Elder, Dempster & Co.; then also 1791, 1798, 1794, 1793, 1796, to Elder, Dempster & Co.

87 All of the above impression copies offered in evidence by defendant and marked Defendant's Z, No. 65 to No. 80, inclusive. (They are not printed. See stipulation, p. 155.)

Q. Now, Mr. Miller, can you give me a memorandum of the sending of the transfers relating to this case, to Elder, Dempster & Co.?

A. I can. The following transfer-sheet numbers were sent to

Elder, Dempster & Co., on November 2d, in a letter which is marked "Plaintiff's Ex. No. 65 for identification."

The letter in question (which was marked "Def't's Ex. Z 81") was read to the court as follows:

"Texas & Pacific Railway Co., office of freight agent, Liverpool.

"NEW ORLEANS, Nov. 2, 1894.

"Elder, Dempster & Co., city.

"GENTLEMEN: Below please find transfers for cotton consigned via your line to Liverpool, England:

1308. ....	16	B. C. Bonham, B. L. 35, cont. 44.
1197.....	25	" " " " " "
1200.....	25	" " " " " "
1199.....	24	" " " " " "
1198....	25	" " " " " "
1265.....	25	" " " " " "
1266.....	25	" " " " " "
1320.....	3	" " " " " "
1319.....	16	" " " " " "
1318.....	15	" " " " " "
1317.....	1	" " " " " "
1798.....	18	" " " 29 " "
1796....	24	" " " " " "
1794.....	24	" " " " " "
1793.....	22	" " " " " "
1791.....	12	" " " " " "

"Yours truly,

C. G. MILLER, *Fr't Ag't.*"

88 In a letter of November 9, 1894, to Elder, Dempster & Co., there was transmitted transfer sheets as follows: No. 1792, 1789, 1795, 1797, 1800, 1801, 2101 and 2355.

This letter (which was marked "Nef't's Ex. Z 82") was read by defendant, and is as follows:

"The Texas & Pacific Railway Co., office cotton department, Liverpool.

"Messrs. Elder, Dempster & Co., agents, city.

"GENTLEMEN: Herewith please find T. F. R. S. for cotton consigned by your line to Liverpool, England. \* \* \*

1792.....	13	B. C. Bonham, B. L. 28, cont. 44.
1789.....	18	" " " " " "
1795....	3	" " " " " "
1797.....	25	" " " " " "
1800.....	7	" " " " " "
1801.....	1	" " " " " "
2101.....	25	" " " " " "
2355.....	8	" " " " " "

"Yours truly,

C. G. MILLER,  
"Ag't J. H. B."

Q. Mr. Miller, have you a record of the dates of the arrival of these various consignments of cotton at Westwego?

A. I have.

Q. And how would you get those?

A. By referring to the car-record book—that is a book showed the arrival of cars at Westwego.

Q. Then, if I understand you, when a train arrives at Westwego a record of the cars of which that train is composed is turned in by the conductor; is that right?

A. Yes, sir; and these waybills show the loading of each of the cars in that train. They show the contents in that way we would understand that a particular car brought a particular lot of cotton. This book which I have, and which I call the car-record book, contains a record of a great many cars aside from those containing these shipments. The only way in which I can ascertain the cars containing this particular cotton would be to take the waybills and ascertain their arrival from them by their numbers. This car-record book is a book which I produced on the demand of plaintiff's counsel, and which has been marked for identification "Plaintiff's Exhibit 9." There is but one of these books.

The defendant thereupon offers the entries in the book marked "Plaintiff's Exhibit 9," of cars identified by the numbers on the waybills already offered in evidence in this case. (Attached hereto and made a part hereof, marked "Exhibit Z," but not printed; see stipulation, p. 155.)

The method of ascertaining the date of unloading at Westwego would be by taking the skeleton sheets, and from them we would be able to ascertain the dates of the unloading of any particular cars. It might be possible that in some instances the dates of unloading would be omitted from the skeleton sheets. In that case we would get the date on which the skeleton sheets were transmitted from the Westwego office to my office in New Orleans. This would be found in the Westwego letter books transmitting them. That letter book has been offered for identification, marked "Plaintiff's Exhibit 49," and the other is produced, which is marked "Defendant's 'Z' 1000." At this time I am not able to state just how many entries on the skeletons are lacking dates. There are a very few of them.

Q. Mr. Miller, after the delivery of these transfer sheets to the steamship agents were any of them in the habit of designating what particular lots of cotton they should take on particular steamers?

A. Yes, sir; that was done by returning the transfers to my office with a letter of transmittal, showing the total number of bales covered by the transfers returned, instructing that the cotton covered by these transfers be delivered to a certain steamer. In some cases where there were only a few transfers, the steamship agents at times would simply endorse on the face of the transfers instructions as to the delivery, returning the transfers. The method practiced with reference to giving steamers cotton not

named in the transfers, in case there was capacity in the vessel to receive it, was to give the steamships all the cotton they would receive and take on board, regardless of whether the cotton was covered by the regular transfer orders or not. I recognize a letter of November 6th, which you show me, and it is a letter from Elder, Dempster & Co., addressed to myself, dated November 6th, 1894, returning us transfers covering an order to deliver to the steamship "Leyden," then due at Westwego, 4,721 bales of cotton, ordering furthermore, that 342 bales short out of the steamship "British Crown," be likewise delivered to the steamship "Leyden" making a total of 5,063 bales in addition to that 200 bales they state in that letter were reported as being short out of the steamship "British Crown;" and if that proved to be the case to deliver these 200 bales to the steamship "Leyden."

The letter referred to (which was marked "Def't's Z 1005") was read by defendant's counsel and is as follows:

"Elder, Dempster & Co., steamship agents and brokers, Liverpool, Manchester, London, Hamburg, and New Orleans.

189 GRAVIER STREET,  
NEW ORLEANS, Nov. 6th, 1894.

C. G. Miller, Esq., T. & P. R.:

Please have cotton as per enclosed transfers ready to deliver to S. S. 'Leyden' now due at Westwego, 4,721 bales. The following cotton shut out of the S. S. 'British Crown,' we would like delivered to 'Leyden;' also—

91

Cont.	43	B. ldg	38,	G. L. O. W.....	1
"	51	"	3,	P. M. D.....	1
"	"	"	2,	O. D. H.....	25
"	"	"	7,	D. Y. E. W.....	1
"	"	"	1,	L. N. G.....	7
"	"	"	4,	L. G. R.....	20
"	"	"	3,	O. A. W... ..	20
"	54	"	37,	B. L. U.....	17
"	"	"	27,	L. K. D.....	200
"	200	"	8,	E. A. C. H.....	50

342 bales.

"Total to Leyden 5,063 bales.

"The following cotton is reported to have been loaded on the 'British Crown.' If the cotton did not go on this vessel please deliver to steamship 'Leyden:'

Cont.	70	B. ldg.	41,	T. C. A .....	50
"	54	"	54,	D. I. F.....	50
"	63	"	34,	C. Y. Z.....	100

200 bales.

"Yours truly,

p. pro ELDER, DEMPSTER & CO.,  
"M. R. WARRINER."

Q. I notice this letter does not designate the numbers of transfers. What was the method of business at your office upon receipt of communications of that sort?

A. I took the transfers received with the communications and compiled a written order on Westwego, covering the same cotton as covered by these transfers.

Q. Have you the document which was transferred on the 6th or thereabouts of November, from transfers enclosed?

A. I have.

The document enclosed (which was marked "Def't's Z 1006") offered in evidence by the defendant, and reads as follows:

92 "Texas & Pacific Railway Company, notice No. O. G. M., 11/7/94, trip No. 17. New Orleans, Nov. 6th, 1894; S. S. Leyden, as per letter from C. G. M. Nov. 7, 1894, the following-described cotton is now at this depot ready for delivery:

Manifest.	Expense No.	B. L. No.	No. B. C.	Marks.	Freight and charges.	Station and consignor.
1375	599	F. 38	14	E. N. N.	Terrell.	F. P. 972

Then follow three pages of similar matter, footing up 4,661 bales.

Q. I show you a letter of October 19th, and ask you what it is?

(The witness being shown the document answers:)

A. It is a letter from Elder, Dempster & Co. announcing to my office transfer for 2,430 bales of cotton to be delivered to the steamship "British Crown" for Havre.

Defendant offers in evidence the letter (which was marked "Def't's Z, 1007"), and the same reads as follows:

"Elder, Dempster & Co., steamship agents and brokers, Liverpool, Manchester, London, Hamburg and New Orleans.

189 GRAVIER STREET,  
"NEW ORLEANS, October 19th, 1894.

"C. G. Miller, Esq., general agent T. & P. railroad.

"DEAR SIR: Enclosed please find transfers for 2,430 bales of cotton, as follows:

"Contract 16, 50 bales.	Contract 34, 200 bales.
" 43, 650 "	" 51, 295 "
" 54, 785 "	" 60, 400 "
"Cotton belt contract 10, 50 bales.	

93 "These are all the transfers we have in our possession.  
 "Please deliver the cotton to the S. S. 'British Crown' for Havre.

"Please hurry all master's receipts; we are still short of some for the S. S. 'Imaum.' We are informed this morning that 450 bales for which we sent you transfers were not delivered to the S. S. 'Imaum.' Please return us transfers and master's receipts which are already signed for these lots. We will return the former and alter the latter.

"Transfers for 451 bales delivered to the S. S. 'Imaum' were handed to a clerk from your office this morning, but we are short of some of the master's receipts. Kindly let us have them as soon as possible.

"Yours truly, ELDER, DEMPSTER & CO.,  
 "Per pro M. R. WARRINER."

Q. I notice, Mr. Miller, in this the following language: "Please hurry all master's receipts. We are still short of some from the steamship 'Imaum.' We are informed this morning that 450 bales, for which we sent you transfers, were not delivered to the steamship. Please return us transfers and master's receipts, which are already signed for these lots." What did they mean by the statement that the master's receipts were signed for bales of cotton not delivered to the steamship?

A. They mean that they had signed the master's receipts and delivered same to us for the quantity cotton therein mentioned, 450 bales, which had not been taken aboard the steamer "Imaum."

Q. Was that customary in dealing with the steamship company that master's receipts were signed regardless of the particular time the cotton was put aboard the ship?

A. I do not know as to just what particular time they did sign the master's receipts.

94 Q. Would not this indicate that they had signed them without regard to the actual putting of the cotton aboard the vessel?

A. Yes, sir, it would.

Q. I show you a letter of October 18th, and ask you what it is?

A. That is a letter from Elder, Dempster & Co., addressed to Mr. Wilkinson, our chief clerk at Westwego, informing him, in effect, that the steamship "Merrimac" would drop down from Southport at noon on the 19th.

Q. I just asked you whose letter it was?

A. It is a letter from Elder, Dempster & Co.

Letter in question (which was marked "Z 1008") read by defendant's counsel and the same is as follows:



*Memorandum.*

NEW ORLEANS, 18 Oct., 1894.

From Elder, Dempster & Co., 189 Gravier street, telephone 1127, Liverpool, Manchester, London, Hamburg, to Mr. Wilkinson, T. & P. Westwego.

DEAR SIR: We are arranging to complete Bs/lg. on "Merrimac" by having her drop down from S'port at noon tomorrow. Let her complete Bs/lg. and give her also as many complete lots for L'pool as she may need to work the balance of the day.

Yours truly,

p. pro ELDER, DEMPSTER & CO.,  
M. R. WARRINER.

Q. Can you tell me why that letter was addressed to Mr. Wilkinson?

A. The matter of ordering cotton to that particular steamship was not handled through my office. The custom was that the Westwego office would not necessarily confine the delivery of the  
95 cotton to steamships to orders sent from my office, in the form that has just been exhibited in connection with the steamship "Leyden."

Q. That is, if I understand you, Elder, Dempster & Co. did in some cases send a steamer direct to Westwego, and give directions direct there—not through your office—as to the loading of that particular steamer?

A. As to some portions of the loading. Elder, Dempster & Co. might communicate with or telephone to the Westwego office to give a steamer all the cotton she would take, over and above what had been regularly ordered, if any, through my office, or the officers in charge of the steamer might inform our representative at Westwego that they would take all the cotton we had on the wharf over and above what was ordered, or my office might have given the information to the Westwego office, obtaining it from Elder, Dempster & Co.

Redirect examination by Mr. CLEVELAND:

Q. I noticed that during the examination, Mr. Miller, you handed to your counsel certain papers. What are they?

A. Orders from Elder, Dempster & Co. for cotton delivered to the steamship "Leyden."

Q. Will you produce those for me?

The witness produces the orders referred to.

Q. It consists of a letter dated November 12th from Elder, Dempster & Co., or a copy of a letter dated November 12th, from Elder, Dempster & Company to yourself?

A. Yes, sir; together with certain transfers.

Q. Where is the original letter of November 12th, of which this letter is a copy?

A. The original letter has been mislaid. I obtained this copy

from Mr. Warringer, the agent of the Elder, Dempster Company.

96 Q. Where is Elder, Dempster & Company's wharf, or where was it in November and October, 1894?

A. One wharf they were using was the Westwego wharf, belonging to our company. They were using another wharf in the city.

Q. Where was the Elder, Dempster & Co.'s wharf was my question, Mr. Miller, if you know?

A. They were using two wharves; they did not own any wharf that I know of.

Q. Where was the wharf they used?

A. They were using a wharf on the city front immediately above Jackson street, as I recollect, in the city of New Orleans.

Q. It was generally known as Elder, Dempster & Company's wharf, was it not?

A. I think so; yes, sir.

Q. Will you produce, please, for me, any other written order by the Messrs. Elder, Dempster & Co., or any agent of theirs, to Mr. Wilkinson, or to any other person than yourself, relating to the loading of any cotton on any vessel during October and November, 1894, than the one marked "Z 1008," which has been read, if you have such?

A. I have no such. I do not know whether I have any more or not. I do not recollect any more than this.

Q. What other variations from the custom which you described on your direct examination do you know of than the exception which seems to be included in "Z 1008"?

A. Well, the officers of the steamships at Westwego would at times inform Mr. Wilkinson, or our Westwego employees, that they would take a certain number of bales of cotton. Elder, Dempster & Company might afford the same information to Westwego, or my office might afford the same information to Westwego, over and above the amounts specifically mentioned in the written order from Elder, Dempster & Company.

97 Q. That additional amount was to replace an amount mentioned on the transfers, which they may receive or that was not convenient. Was that not right?

A. No, sir; not exactly.

Q. Do you know of any other reason for taking such an additional amount not mentioned on the transfers, than simply because it was not handy to get out?

A. At the time that Elder, Dempster & Company would order a steamer to Westwego, we might have, say (for which Elder, Dempster & Co. held transfers) 2,000 bales, or the steamer might have room for, say, three or four thousand bales; then the Westwego office would be informed—from one of the several sources or probably several sources—that they might deliver to that steamer up to 3,000 to 4,000 bales in case they should have that amount there, or in case it would arrive during the time the steamer was loading. That occurred at times.

Q. Do you know of any instances of that occurring. If so name it?

A. I do not recall any specific instance of that occurring where subsequent arrivals made it necessary to observe that practice. I recall in a general way that that practice was observed, and we have had such instances. Those instances were not contrary to our usual practice. That was the practice under those circumstances.

Q. The usual practice, as I understood you to say in your direct examination, was to transfer to the ship such cotton as you had orders for to deliver to such steamship from Elder, Dempster & Co. Is that the fact?

A. That is the fact, yes, sir.

Q. In what instances, within your knowledge, were there variations from that custom?

A. In the instance of the steamship "British Crown;" some cotton was delivered to the steamship "British Crown" that was not ordered by Elder, Dempster & Company; some cotton that was ordered was not delivered.

Q. That is, shut out, as you call it?

98 A. Yes, sir.

Q. Why was it shut out, do you know?

A. The explanation being, as I recollect it, that Westwego was given to understand, or was under the impression, that the "British Crown" would at that time take more cotton aboard than was called for on the order from Elder, Dempster & Company. The cotton was shut out because the arrangement was not carried out. That is, the steamer filled up before all the cotton was placed aboard. Probably, couldn't carry as much as she figured on carrying.

The defendant offers letter of Elder, Dempster & Company of November 12th, 1894, reading as follows (Pl'ffs, 98):

Elder, Dempster & Co., steamship agents and brokers, Liverpool, Manchester, London, Hamburg, and New Orleans; telephone, 1127.

189 GRAVIER STREET,  
NEW ORLEANS, November 12th, 1894.

C. G. Miller, Esq., T. & P. railroad.

DEAR SIR: Enclosed please find transfers for the following:

	Contract No.	16.....	50 bales.
	"	60.....	500 "
	"	67.....	150 "
	"	73.....	200 "
	"	79.....	100 "
C. B.	"	10.....	50 "
C. B.	"	33.....	61 "
	"	54.....	200 "
	"	63.....	1,330 "
	"	70.....	725 "

99

Contract No.	78.....	100 bales.
"	" 205.....	100 "
C. B.	" 28.....	206 "
Total .....		3,772 bales.

which please deliver to S. S. Leyden.

Yours truly,

Q. Do you know of your employés at Westwego ever allowing a bale of cotton going aboard a steamship without a mate's receipt for it?

A. No, sir; I do not recall any such instance. I have known of mate's receipts being given for cotton that did not actually go on board the steamship of which such mate was an officer.

Q. Is that the case in relation to the master's receipt which had been given concerning the steamship "Imaum" mentioned in Z 1007?

A. Not that I know of. I judge that was a case where the mate's receipts were not given.

Q. Explain to me a little further what is meant by these words: "Please return master's receipts for these lots."

A. That Elder, Dempster & Co. issued and signed master's receipts and delivered them to us for certain cotton which they afterwards discovered did not go aboard the steamer.

Q. Have you a certain mate's receipt or master's receipt for any cotton mentioned in any of the 43 suits in question?

A. We have, that I know of, one mate's receipt and one master's receipt for 50 bales of cotton that was not here at the time of the fire, and was, subsequently, delivered to the steamship "Mexico;" I refer to the case that we had in hand this morning.

Q. You are now referring to the 50 bales covered by Exhibits Z 1001 to Z 1004?

A. Yes, sir. Those 50 bales were not here at the time of the 100 fire. They subsequently arrived and were delivered to Elder,

Dempster & Co. They are involved in the Leach, Harrison & Forwood suit, I believe. I have another instance here, which illustrates the practice that I just outlined awhile ago, as to cotton taken by steamers not on the orders which my office sent to Westwego. In this instance the steamship "Montezuma," Elder, Dempster & Company, my office, in a memorandum to Mr. Wilkinson at Westwego—directed that we deliver to the steamship "Montezuma" cotton on hand in excess of the cotton ordered. This is a direction from one office to the other. Now, the exception of the transaction shown by this exhibit marked "100," and the transactions shown by Exhibit Z 1008, I do not recollect specifically any other similar practice. These two instances were in line with the practice recognized at that time. That practice was, in case a steamer should go to Westwego with room aboard and wanted to receive from three to four thousand bales, and we should have, say, only 2,000 bales at the time the steamer reached Westwego, the

2,000 being regularly ordered by the steamship agents, the practice and the understanding was, that the Westwego office would deliver any cotton in excess of the 2,000 bales that they might have or that might arrive after the steamer reached Westwego, or after the regular order was given from Elder, Dempster & Co. It was not ordinarily the custom to take anything but complete lots. I may have other letters from Elder, Dempster & Co. during the last half of October or the first twelve days of November, 1894.

A. I may have; I have none here. I have some daily reports for October, 1894. I find my file is incomplete, I have probably but half of them here. I think they cover 15 days in the latter half of October. The file is complete from the 15th of October, that is, practically so. There may be one missing. I do not know whether we have what we call the ship's bills of lading for all the lots of cotton mentioned in any of the suits. We would have some. I do not know whether we have all or not.

101 Recross:

Q. You were inquired of respecting Elder, Dempster & Co.'s wharf in the city of New Orleans. Was it the custom of the Texas and Pacific Railway Company to ever deliver cotton to Elder, Dempster & Co., at that wharf?

A. At times.

Q. What kind of cotton or nature, or sort of shipments, were delivered to Elder, Dempster & Co.'s wharf in New Orleans?

A. Practically the same class of cotton as that we were handling at Westwego; but it was not the custom to make deliveries at that wharf of Elder, Dempster & Company in the city at that time. At that time we were handling their business at Westwego, and we had been handling it at Westwego, probably for a month or a month and a half, previous to the fire, as to that particular season of 1894-'95. It had been so handled also the previous season at Westwego. There was no other recognized place of connection between Elder, Dempster & Co.'s line of steamships and the Texas and Pacific Railway Company than Westwego, at and prior to the time of the fire.

By Mr. CLEVELAND:

Q. Was no cotton delivered at Gouldsboro?

A. No, sir. Cotton delivered to Elder, Dempster & Co. at their wharf at New Orleans was drayed to the dock by the Texas and Pacific from our warehouses and depot at New Orleans. In the season of 1894-'95 some cotton was delivered by the Texas and Pacific Railway Company to Elder, Dempster & Co. at their dock in New Orleans.

A. I do not remember of any cotton delivered by the Texas and Pacific Railway Company to Elder, Dempster & Co. at their dock at New Orleans in the season of 1894-'95. I do not say positively that there was none during the season of 1893-'94; there may have been some cotton delivered to Elder, Dempster & Co. at New Orleans; I do not remember specifically as to that.

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The defendant also offered the deposition of GEORGE W. ROTH, who testified as follows:

I reside in New Orleans; my business is superintendent at Westwego. I have been superintendent of the elevator part since July, 1892. Since January 1st, 1895, I have been superintendent of the wharf. In November, 1894, I was on duty there as superintendent of the elevator.

Q. Will you look at this which I show you and state what it is?

A. It is a port regulation for Westwego.

Q. From whom did you receive that?

A. From Mr. Cope, president of the board of harbor masters. Mr. Cope, Mr. Fitzgerald and Mr. Dean were the parties who brought it to me at Westwego. They stated when they brought it that I was to be the sole judge of what right one ship would have over another in the movement of vessels in the absence of the harbor master. This resolution was adopted January 10. I could not say exactly what the time was they brought it over. It must have been probably two or three days after that date, in the year 1894. There was no writing given by them to me evidencing my authority to act for them. They simply mentioned this tenth clause. They said I was to act and be their agent there. And these gentlemen were the harbor masters, and Mr. Cope was the president, and this is the paper which they furnished me.

Defendant also offered the deposition of EDWARD L. COPE, who testified as follows:

I reside in the city of New Orleans; I am deputy commissioner and superintendent of the port of New Orleans at present. In 1894,

I was harbor master and president of the board of harbor masters at that time. I am now deputy commissioner. By

act No. 70, of 1896, there was a port commission created which superseded the board of harbor masters. I have custody of the records of the board of harbor masters for 1894, and they are still in my possession. I have the proceedings of that board of the 10th of January, 1894.

The book produced.

This is the record to which I refer of the board of harbor masters. The record of the meeting of January 10th, 1894, is as follows:

" Board of harbor masters, port of — Orleans.

" The meeting was called to order by the president and the following members were present: Edward L. Cope, Jno. J. Fitzgerald, E. D. Dean and John Davidson; absent, Geo. Buchert. The object of the meeting was to adopt rules and port regulations to govern Westwego. The following rules and port regulations were unanimously adopted:

" First. The harbor master has authority by law to regulate, moor and station all vessels at the wharf and to remove them from time to time to make room for others, and the degree of accommodation



which one vessel shall afford to another the harbor master is constituted sole judge.

"Second. Vessels coming to the wharf must have their yards braced sharp up by the port braces, their port anchor cocked-billed, or at the hawse ready to let go. Boats, bumpkins and davits to be rigged inboard.

"Third. Jib-booms must be rigged in the full length before landing, and no jib-booms shall be rigged out unless by permission from the harbor master, and then at their own risk.

"Fourth. Any person cutting or interfering with the moorings of any vessels will be punished according to law.

104 "Fifth. Any persons throwing ballast, rubbish or anything that will sink into the river, will be punished according to law.

"Sixth. The heating of pitch, tar or rosin is strictly prohibited on board any vessel lying at the wharf.

"Seventh. Vessels will not anchor at or near the wharves without permission of the harbor master.

"Eighth. No vessel shall change her berth without permission of the harbor master.

"Ninth. Masters of vessels failing to comply with the above rules will be held responsible for all damages in consequence besides laying themselves liable under the law.

"Tenth. And in the absence of the harbor master the superintendent in charge is authorized to enforce these regulations and to designate what accommodation which one vessel shall afford to another in conducting their business.

"That the secretary and treasurer have a sufficient number of both port regulations applying to the east and west banks and Westwego printed on large card-boards, and those applying to Westwego be sent to the superintendent with a letter designating how far he shall act in regard to section No. 10 of said port regulations.

"Having no other business on hand, the board adjourned.

"New Orleans, Jan'y 10th, 1894.

"(S'g'd)

JOHN DAVIDSON,

"Sec'y & Treas."

I remember going to Westwego with one of my colleagues and introducing him to the superintendent there; I do not remember the exact date. I believe the superintendent's name there was Roth at the time, but I am not sure. He was the gentleman connected with the elevator. He was considered the superintendent of the wharves there, was acting as manager of the wharves, I believe.

Q. And under section 10 of the resolutions adopted, or the rules adopted on the 10th of January, what appointment, if any, was made at Westwego?

105 A. Those resolutions were passed with the object of deputizing the superintendents of the wharves over at Westwego, and clothing him with authority there, by the harbor master, to move vessels in the event of the harbor master's not being there. I

don't know whether that is section 10 or not, but that was the object of the meeting. I do not remember the resolutions exactly, but it was simply to designate a superintendent of wharves over there, who should have charge of locating vessels at that wharf. I recognize the paper this morning, it was printed in accordance with those resolutions and paid for by the board of harbor masters. It was a copy of that which was taken by us to Westwego. One or more copies were printed expressly for Westwego under that resolution of the board of harbor masters.

Q. Now then, do you know who acted in 1894 in regard to collecting harbor dues under a State statute from vessels in New Orleans?

A. The harbor masters collected from 1882, or rather, from 1888 to 1894, to my positive knowledge, because I was a member of the board of harbor masters.

Q. What do you know about the collection of harbor dues of vessels going to Westwego?

A. The harbor masters collected all dues from vessels that went to Westwego during the year 1894—from 1888 to 1894.

Q. And you mean the whole of 1894 in your answer?

A. Yes, sir. There was no difference at all in the harbor dues at Westwego and other points in New Orleans.

#### Cross-examination by Mr. CLEVELAND :

Q. By what act was the board of harbor masters created?

A. The harbor masters—it's in the Statutes of Louisiana, page 698, article 3, section 1681. That was the creation of the board of harbor masters, of whom there were five appointed by the governor of the State of Louisiana.

106 Q. Who put the board of harbor masters in motion in relation to Westwego?

A. The board of harbor masters, proper, in the city of New Orleans. Who put them in motion in relation to Westwego, and why did we take this action, we took this action because we considered the law gave us authority to depute any one over there, and I think, if you will look over the law, you will find the harbor masters have authority, by law, to depute any one to fill their place. The book which I have produced contains all the minutes of all the meetings held by the harbor masters until the dissolution of the board, that is from the time I was there.

Q. I see there was a meeting held June 15, 1884, and one on November 27, 1888?

A. That was when I was first appointed; one on December 1st, 1888; one on February 6th, 1889; one in February, 1890, one November 7th, 1890; one on December 1st, 1890; one on December 7th, 1890; one on July 27th, 1892; one September 23, 1892; one on January 9, 1893; one on February 1st, 1893, and the next seems to have been on January 10, 1894. Nobody asked us to adopt those resolutions. On January 10, 1894. It was not brought to our attention by the Texas and Pacific Railway Company. We did it of

our own motion. We came to the conclusion that we had power to adopt rules and regulations concerning Westwego from the fact that we thought Westwego was in the port of New Orleans, or it was a question whether it was in the port of New Orleans, and we did it believing it to be a part of the port of New Orleans. We have since ascertained that it was not a part of the port at that time. We know there has been a law passed incorporating it since as a part of the port of New Orleans. At that time we believed it to be a part of the port of New Orleans, and believed it to be a portion of our collection district. We have since ascertained our mistake by the passing of the law incorporating it in the port of New Orleans.

107 Redirect examination.

By Mr. TAGGART:

Q. With reference to it now being within the port of New Orleans, in reference to the statutes of the United States?

A. Yes, sir; we always considered it a part of the port of New Orleans, and did at the time, and was surprised when we found it was not included in the custom-house business.

Defendant thereupon offered paper in evidence identified by witness Roth, and the same was marked "Exhibit Z 1026" and made a part hereof (printed p. 152 *post*).

The defendant thereupon called as a witness ALGERNON L. WILKINSON, who testified as follows:

I reside at Clarkson, Texas. I am connected with railroads and railroad business, and have been since 1872. Prior to November 12th, 1894, I was employed by the Texas and Pacific railroad at the Westwego wharves, New Orleans, of Jefferson parish, Louisiana. I had been so employed since January, 1894. I was clerk in charge of the wharves, or chief clerk of the wharves. The business transacted at those wharves was, generally speaking, receiving cotton and other freight to be delivered to steamships. Besides cotton, handled cotton-seed meal, cake, cotton seed oil, some staves and some logs; but the bulk of it was meal, cake, cotton and oil. There was a season or time known there as the cotton season; that would cover from September, say, until March or April following. As to a general description of the wharf there, there were two platforms or sheds. The wharves were separate, No. 1 and No. 2 shed running parallel with the river and a width of about 140 feet, then a space between the sheds and the platform, where we unload the cars, of ten feet, and then from the shed to the river front about 50 or 60 feet. On the outside of the shed from the river there were two tracks, next to the river front one track on the wharf, 108 the other two below the wharves, so that the car doors would be level with the platform, about four feet six or eight inches lower. This wharf was used for freight for the different steamship lines.

Q. What different steamship lines received freight at this place?

Mr. CLEVELAND: Is that material?

Mr. TAGGART: I submit that it is, as showing that it was a recognized place of terminus for steamships, and showing the custom of doing business.

The COURT: The freight shipped by steamers by other people would not be material.

Mr. TAGGART: But showing that they recognized it as a regular place of connection with the railway; that it was a well recognized place between this railway company and steamship lines, I think I may show.

The COURT: You have already shown that either the whole or a great bulk of your cotton that came from the West by the Mississippi there was carried on your own rails and delivered to the steamer. That is in proof now.

Mr. TAGGART: I think Mr. Miller only testified as to the Elder-Dempster Company.

Mr. CLEVELAND: And the Harrison line also.

Mr. TAGGART: That is a fact, but it is not in proof up to this time. If it is a conceded fact, I shan't take any time for it—if it is understood that steamships generally went there other than the Elder-Dempster Company.

The COURT: Not the steamships generally, but the steamships to which you had freight to deliver. Any line to which you had freight to deliver west of the Mississippi went there to get it.

Q. What force generally did you have upon the wharf there?  
Just describe what force of employees there was.

109 A. That would depend upon the seasons. Taking the cotton season in October and November, say in 1894, we had in the office three clerks who attended to the records, &c., the office part of it. I had a clerk that kept the car numbers. I had a general force outside, and the check clerks would vary according to what we had to unload during the day. Some days eight, ten, or twelve, and some days three or four. The labor would run from 50 to possibly 200 a day. Those we would pick up in the same manner, with a few exceptions of regular ones. The first thing when a shipment came to Westwego the waybills would come with the car. They were brought in and checked by the yard clerk to see that they corresponded with the car. The waybills were brought in the office and skeletons made from those waybills, running with a progressive number, pro. numbers we call them; those pro. numbers were put on a clip or file and kept until called for, made and dated the day the car arrived there. The waybills then were worked up of the different cotton goods, giving the shipment point, car number, destination, consignee, marks, and were forwarded with a note for record to be kept of them in the New Orleans office. After the skeletons were thus prepared they were held subject to the cars being brought in to be discharged. For instance we wanted a certain lot of cotton in car 4200, we would get the skeleton of that car. it would be put on a platform, put in a shed ready to ship; the clerk who unloaded the cotton would mark on the skeleton the location of the port to which

the cotton went. The clerk would take this skeleton for the purpose of doing what I have described when the car was placed there for unloading. The waybill might arrive some time before the car would be sent up to the platform. The skeleton was dated the day the car would be received. In the meantime the cars would be kept on the storage tracks in the yard. There were numerous other tracks there. The skeletons were of the date the car came;

110 the date we received the car was the date of the skeleton.

The first thing to be done was when the car is placed on the wharf for unloading, the clerk in charge of the car took the different car seals and put them on the skeleton; that is, the impression of them. After taking the seals they would be opened and a gang-plank put in the car and the cotton put to its location in the shed. The location is left a good deal to the clerk, unless we have a particular reason to instruct where we want the discharge. He would then take out the contents of the car; say it called for fifty bales IXL cotton, if it was O K he would sign it, and put his name and put the location post, say No. 6. The shed was subdivided in fifteen locations to each shed. There were two sheds. Location No. 1 would be in the first section of No. 1 shed, run on through the shed in that way. I do not mean crosswise; I mean up and down the river. The posts were numbered. They were numbered with the shed up and down the river. He would then note the location on the skeleton, take it to the office and make his notations in ink, so that we would get an impression of them. The date of the unloading of the car was put on by the check clerk, also; the date he discharged the car was put on the skeleton; the skeleton showed everything. As to skeleton 1367, which you show me, that was made out on the 30th O K John S. —; that car discharged on the 31st of October, and the location was post 22. Over here you will find the seals, as I have said—one side the seal 112; and there is one with the post—the location. In that way we would know the location of cotton having a particular mark, and also the date of unloading. Then, when that skeleton passed into the office, the clerk would take the skeleton and post the cotton record, showing that location on there, and those skeletons would be sent to the New Orleans office. We had a particular shed for cotton destined for a particular place. We tried to divide it off so that we could berth a vessel, and when she came there to get the cotton she could take it from the most convenient point, saving trucking a long way.

111 As to different points for different destinations, we had the east end No. 2 shed, or down-river end full of Bremen cotton—had been there quite a while; and we had Havre and Genoa toward the middle of the two sheds, and the bulk of Liverpool in No. 2 shed, some of it in 1. After unloading the cotton in this way it was left there for the ship to come and get it. When a ship came to get the cotton as a rule generally, the New Orleans office sent up a list of the cotton that the ship was to take; sent it up to our office. Then when the ship berthed the purser, or who ever was assigned to the cargo, would take the cargo from the wharf, would come in, we would locate the lots of cotton and go there with him and count

them as they stood in the sheds, he would O K it and then the longshoremen would break down the cotton, take the trucks to the river front and from that into the screw and put it into the ship. These longshoremen were in the employ of the stevedore who loaded the ship, and the screw men also. What I have described was the regular method of dealing with Elder, Dempster & Co. and the other steamship companies; that is, the regular routine of the work. It was during the time I was there.

By the COURT:

Q. When the ship's purser went there he went there with some of your clerks?

A. Yes, sir; just to count them.

Q. And when the ship's representative was there, not only the ship's representative was there, but your representative was there?

A. Yes, sir.

Cross-examination by Mr. CLEVELAND:

Our representative showed the ship's representative where the cotton was. He had no location, we had to show it.

Q. Was the wharf in the exclusive possession of the railroad company, as far as you know?

112 A. It was the general wharf for any ship that wanted to come and get cotton.

Q. But the railway company employees were the persons on the dock?

A. We employed the men on the dock. When anybody came there on the deck of the dock it was generally understood that they had permission of the railroad company. They have landed there without permission of the railway company, I suppose. I was the clerk in charge of the dock. I do not know whether I would have allowed a person to land unless I knew he had permission of the railway company or not. It all depends on circumstances. He might explain what he was there for. He would have to explain what he was there for in order to get on the dock, and that explanation would have to be satisfactory to me. We delivered other freight than what came over the Texas and Pacific rails to other ships. I am agent for the Texas Pacific Railroad at Clarksville, Red River county, Texas. I left Clarksville the 6th or 5th of this month, and I have attended here at the request and expense of the railway company. I have paid my own so far; I guess they will foot it. I went there last August. I am staying around at different places. I eat anywhere I land. I am down at Smith & McNell's; I have a room there. It is down on Fulton and Washington streets. I went there on Thursday last. I have been at Clarksville since August last. In July last I was at Paris, Texas, in the employment of the Texas and Pacific Railway Company, and was there since March, 1895. Then, from March, 1895, to August, 1896, I was in Paris in the employment of the railroad company as assistant agent there. I had charge of the company's property



there and attended to station work. It is a kind of dual position there. They have a commercial agent, and he was supposed to be away at the time, and I was to run it. From March, 1895, I quit the service of the Texas and Pacific Railway Company on the 27th of November, 1894, and I was idle until I went to work in the following March. I was in Chicago on the 113 West side, 297½ Oakley avenue, where I was keeping house with my family while I was idle. I was at no other place. I was not discharged by the Texas Pacific; I left of my own free will and accord, and have a copy of my letter of resignation, if you would like to see it. That was on the 27th of November that I resigned, and all the time from the 27th of November until March I was in Chicago. I think I was out of the city one or two days; I know I was in Indianapolis at that time. I went directly to Chicago from New Orleans, leaving New Orleans in December. In New Orleans I lived below the canal in Westwego, in what is called the white house there. I entered the employment of the defendant originally in January, 1894; prior to that time I had been at Savannah, Georgia. I did not go directly from Savannah to New Orleans. I was in Savannah in the fall, and went over to Union Springs, Georgia, and stayed a month or two, and went in the latter part of November or December, 1893. In Savannah I was in the employment of the Central Railroad and Banking Company of Georgia. I was not at their general office. I had charge of the terminals, of the wharves, and yards of Savannah as the agent. I went to Savannah from the Chesapeake and Ohio Railway Co., employed by Mr. C. C. G——, in New York, in October, 1890. I was general yardmaster of the Chesapeake and Ohio. I took charge of the yards in October, and in June following, in addition to the yards, I was given the terminal, which I had charge of, as I have stated, until 1893. I went to Richmond in 1880; was connected with the Richmond and Cairo and the Richmond and Allegheny until it was bought up by the Chesapeake and Ohio in 1889. In 1893 I left the employment of the Central Railroad and Banking Company of Georgia, in Savannah; that was September 30, 1893. When a ship arrived at Westwego, and the purser or the mate came on the dock, he would come to the office in regard to the delivery of the cotton to be shipped. I mean in my office, and the cotton was pointed 114 out to him. I or some of my employees went around to the different points and pointed out the cotton. I did not necessarily receive any paper from the ship or ship officers. They would come up and ask for the cotton. They would likely have the paper downtown, unless we got a message over the 'phone to give them any cotton they wanted. I got the mate's receipt for them before they left the wharf. I never knew of a bale of cotton leaving that wharf without a mate's receipt being given for it, except it was an oversight. I received messages over the 'phone to deliver cotton. The messages came from the New Orleans office, and also from the steamship agent, to give the ship what it could take, or not to give her certain lots; that she couldn't take it; her space was engaged else-

where. As a rule, my orders came from the New Orleans office. I worked under the New Orleans office.

By the THIRD JUROR:

Q. I want to know, after the cotton had been delivered off the cars on the dock, who paid the expenses of handling it up to and including the time it was given to the ship?

A. We paid the expenses of the cotton to put it on the dock, on to the wharves.

Q. From the time it was delivered on to the dock from the car, who paid the expenses up to and including its delivery to the ship?

A. What do you mean by delivery to the ship—taken aboard of the ship?

Q. Handing it to them?

A. The ship paid for taking it out of the shed. We were not even allowed to put in a man to help them without they paid 50 cents an hour. We only paid fifteen.

The defendant also introduced NATHAN DRAKE PEARSALL, who testified as follows:

I am division superintendent of the Louisiana division of 115 the Texas and Pacific Railway Company. My division includes the terminals at Westwego. I have been division superintendent not quite ten years. I was division superintendent when the Westwego wharves were built, which was in the fall of 1892. Since they were built they have been used for delivering the traffic of the Texas and Pacific Railway Company to steamships. They have been continuously so used since they were built. The Texas and Pacific has a wharf between Thalia and — street. It does not own additional wharves on the west side—the Westwego side—except at Westwego. The wharves in New Orleans are used for transferring freight to steamships; they are used for any business that the Texas and Pacific may have over the wharves, and, also, a part of the wharf is used for an inclined track to transfer cars across the road. The wharves at Thalia street are connected with the yard tracks in New Orleans. I know something in a general way of the delivery of cotton to steamships at Westwego. In a general way the wharves at Westwego are used by the Texas and Pacific railway to deliver traffic, cotton, cotton seed meal, staves, any class of traffic they may have, cattle or anything of that kind that is for delivery to steamships. I remember very distinctly the situation of the wharves at Westwego in the early part of November, 1894. During the cotton season I have frequently had conversations with Elder, Dempster & Co. or their agents, the Warriners, in New Orleans, respecting the removal of the cotton wharves—that is, prior to November 12th. I had conversations about once in ten days—as often as I saw any of their agents or representatives on the dock. The last distinct interview I remember with Elder, Dempster & Co.—with the Warriners, the agents of Elder, Dempster & Co.—prior to the fire was on Monday, and the fire occurred Monday night. I had that particular interview with Mr. Warriner, the

agent of the Elder-Dempster Company. I think both the brothers were present. The conversation took place in the office of Elder, Dempster & Co.

116 Q. Now will you state the substance of that conversation?

A. The substance of the conversation was, first, the amount of the cotton on hand at Westwego for Elder, Dempster & Company, which was stated, and the importance of moving the cotton was also stated by me, and they were requested to make every effort to move it at the earliest possible moment, and to comply with their contract. The exact words of their conversation I don't remember, but the sense of it was that their ships had met with great delays in New Orleans on account of the labor troubles that they had. At that time there was considerable trouble between the steamship agents and the cotton screw men; they were on a strike, the screw men, and they gave that as an excuse for not carrying out their contract of removing the cotton. That is about the sense of the conversation; I don't remember the exact words.

Q. What, if anything, was said by them as to expecting vessels or vessels being due.

A. They made the statement of when the vessels would be at Westwego, but I have forgotten what they said.

So far as I can recall prior to the 12th of November, I had a conversation with them—a week or ten days previous. I called at Elder, Dempster & Co.'s office in company with the general manager, Mr. L. S. Thorn, and had the same conversation.

By Mr. CLEVELAND:

Q. I thought you said Mr. Thorn was the superintendent of Elder, Dempster & Co.

A. No, sir; general manager of the railway company.

By Mr. TAGGART: The amount of cotton for Elder, Dempster & Co. was stated, about the amount, and the time it should have  
117 been removed, and the necessity of it being removed, and they gave about the same excuse that they had in the conversation previously mentioned. They may have mentioned the delays—some other delays—that I have forgotten; but that was the principal excuse.

Cross-examination by Mr. CLEVELAND:

Q. Do you happen to know that Elder, Dempster & Co. took away on the "Merrimac," on October 23d, 4,762 bales of cotton?

A. No, sir; I wouldn't know that unless I examined our records.

Q. Do you happen to know that they took away on the "Mound," on the same date, 5,506 bales of cotton?

A. No, sir.

Q. Do you happen to know that they took away on the "Montezuma," on November 24, 2,583 bales?

A. No, sir.

Q. Do you happen to know that they took away, on November 6th, on the "British Crown," 6,100 bales?

A. No, sir; nor that, on November 4th, they took away 4,000 on the "Hajeen." She arrived at Westwego October 31st. I presume a large amount of that was on the New Orleans side.

Q. Well, you know the "Hajeen" took cotton from Westwego?

A. No, sir.

Q. Haven't you heard that in the testimony of Mr. Miller today?

A. I did not hear Mr. Miller's testimony; I was in the court-room, but I did not hear it. I would not know except by the records that Elder, Dempster & Co. had these different ships at Westwego loading their cotton at the times you indicated. The first conversation I have narrated was about noon on the 12th of November. I went to their office. We spoke to Mr. Warriner. I think both brothers were present. Mr. Thorn opened the conversation  
118 by stating the amount of the cotton. I am now stating the conversation I had in company with Mr. Thorn. I only went once with Mr. Thorn. November 12th I went in company with Mr. Miller. We stated the amount of cotton on hand for them at Westwego, and requested to know when it could be moved. That was about the substance of the conversation. They gave various excuses.

Q. Don't tell me what they gave. Did they say excuse?

A. I do not know the words they used. They said in substance that their ships had been delayed; the principal cause of the delay was the labor troubles in New Orleans at that time. They also stated some of their ships had been delayed by bad weather, or something of that kind; that is all I recollect. I have been speaking about the conversation of November 12th—the one when Mr. Miller was present. The other conversation was in the same office. I went there with Mr. Thorn. I think it was about ten days before the fire, at about noon. All I remember being present, except the Warriners, was Mr. Thorn. I won't be sure both the Warriners were there; they had several clerks around. Mr. Thorn opened the conversation. He stated about the substance of the conversation. He stated about the amount of cotton on hand for Elder, Dempster & Co., that they had contracted to take and was to be moved by their steamship line, and asked when they could move it, and what the prospect was of the railroad company getting rid of it. The answer was that their ships had been delayed, and principally because of these labor troubles. I cannot recollect anything else that was said; that is the substance. I have now given you on my cross-examination the substance of both those conversations.

The defendant also introduces EDWARD L. SARGENT, who testifies as follows:

I am general freight agent of the Texas and Pacific rail-  
119 way, and reside at Dallas, Texas. I have been general freight agent since September 1st, 1892. I am acquainted with the Messrs. Warriner, of New Orleans. I had a general understanding with them prior to November 12th, 1894, respecting the place where their steamers would receive cotton from the Texas and Pacific Railway Company.

## By the COURT:

Q. The question is, whether you have had a conversation with Warriners?

A. Yes, sir. I had a conversation with Mr. Warriner, of the Elder-Dempster Company; the particular time was on the 27th of September, 1894, and the conversation related to the place of delivery of cotton.

Q. What was that conversation?

A. I called on Mr. Warriner, who represents Elder & Dempster at New Orleans, in reference to making a large contract for cotton to be delivered to him to be taken to Liverpool. We did not close on that day because he wanted to consult his principals, who, I believe, are located in Liverpool. We offered him a certain figure for the transportation of 20,000 bales of cotton to be received by him at Westwego and delivered at Liverpool. He was to cable that day, and I went back to my headquarters at Dallas. On the 29th of September I had a telegram from Mr. Miller, which stated that he had heard from his principal. Cotton was subsequently delivered to Westwego. Mr. Warriner said he would send his ships there for any amount over 500 bales.

This being all the testimony offered by the defendant in the above-entitled cause.

NATHAN DRAKE PEARSALL recalled by the plaintiff:

I said we built the dock in Westwego in the fall of 1893. I meant the Texas and Pacific; it was its own private dock.

Thereupon the plaintiff read the deposition of CALHOUN FLUKER:

120 I am special deputy collector of the port of New Orleans. I have been so for three and one-half years, and was during the months of October and November, 1894. I know the place called Westwego on the other side of the river.

Thereupon the plaintiff also read in evidence the deposition of M. WARRINER, who testified as follows:

Q. Mr. Warriner, what is your occupation?

A. Representing the Elder, Dempster Company, steamship agents. I have been representing the Elder, Dempster steamship line at New Orleans since 1892. In 1892 we were allotted a wharf at Jackson street. We have retained this wharf up to the present time. We have loaded vessels at other docks in the port of New Orleans. We have had no other leased or special dock. This is a grant from the city. It is not our dock. It is known in New Orleans as the Elder, Dempster Company's dock. During the season of 1893-'4, the season before the fire at Westwego, I think we received cotton from the Texas and Pacific Railway Co. I couldn't tell you, only very approximately, the number of bales we received from the Texas and Pacific Railway Co. during the season before the fire. But it would run into the thousands, I should think. We received a con-

siderable quantity during the season 1894 and 1895 from the Texas and Pacific Railway Co. That cotton was delivered to the Elder, Demster Company's line at New Orleans in the season of 1893-'4 by dray, and during the season of 1894-'5 by drays and barges. During the season of 1894-'5 we also sent some of our steamships to Westwego to load.

Q. Will you please explain to me the custom that existed in the season of 1894-'5. That is, in October and November, 1894, in relation to the loading of cotton at Westwego?

A. We just sent our ships there to get whatever cotton was ready for delivery and signed for it.

Q. What was the first step in the process?

121 A. We would try and find out how much there was there first for us that they were ready to deliver. We received from time to time what they called transfer slips, which we took to be notification of the arrival of cotton and readiness for delivery.

Q. Look at the paper which I now show you, Mr. Warriner, being Plaintiff's Exhibit No. 65, a letter-press copy of a letter dated New Orleans, November 2d, and addressed by the Texas and Pacific Railway Co. to you. You recollect receiving letters of that character from the Texas and Pacific Railway Co.?

A. Constantly.

Q. Look at the paper which I now show you, which is marked "Def't Ex. Z 1005;" that is your letter to the Texas and Pacific Railway Co. produced this morning by Mr. Miller, dated November 6th.

A. Ordering cotton to the Leyden.

Q. And you say in this letter, "Please have cotton as per inclosed transfers ready to deliver," etc.?

A. Yes, sir.

Q. Look at the paper which I now show you and which is marked "Def't Ex. Z 1006," and state if that is the class of transfers which you from time to time returned to the Texas and Pacific Railway Co.?

A. No; that is not the general form of transfer we returned. That is not the general form referred to here.

Q. What was that general form?

A. The general form is on a yellow slip—a long yellow paper.

Q. Such as the paper I now show you marked "Def't Ex. Z 128"?

A. Such as that.

Q. Now, you were about to say something concerning your custom in relation to these transfers?

A. The custom was to return these to the railroad with the order to deliver a specific steamship either at Westwego or about due at Westwego. I do not recollect ever seeing the particular paper which is shown me marked "Def't Ex. Z 1006." I remember a paper, something like that, in special instances where steamers were  
122 due for large quantities of cotton, and special settlements were made in the communication between the two offices. Special



communications were made from time to time to make the records clearer. Having received these transfer slips from the railway company, we returned them to the railway company as soon as we were ready to take delivery of the cotton. The custom that existed as to the actual delivery of the cotton to the ship was the same all over the port. The receiving officer of the ship counts the cotton and signs a receipt for it; the same with the Illinois Central depot; it is the same with the Southern Pacific, and it is the same with all the roads. The next step taken, after the officer of the ship has signed a receipt for it, he keeps its counterpart and sends that down to our office, and we sign the mate's receipt for the master. The master delivers the master's receipt to the railway company. The mate's receipts are sometimes taken away by the ship and sometimes they're not. Sometimes they take them away for their own purposes on the other side, in case there should be any dispute. The master's receipts are given in the form which you now show me; namely, "Deft's Ex. Z 1001." We did not make out and deliver to the railway company other form of receipt or bill of lading than the master's receipt.

Q. I show you a paper put in evidence this morning marked "Z 1007." Will you please read it and then state what this paragraph means: "Please hurry all master's receipts; we are still short of some for the steamship 'Imaum.' We are informed this morning about 450," etc.?

A. We get these forms filled in from the railroad with one plain copy of the through bill of lading. We get such forms such as "Z 1007" with a plain copy of the through bill of lading from the railroad company, and we mean by the words which are quoted to me that we are short of these documents, and could not sign them and could not make up our record. That the ship could not get up her freight list, and we couldn't settle with the ship. That is

what is meant by the words you have quoted, "Please hurry master's receipts. We are still short some for the S. S. 'Imaum.'"

Q. Then the railway company would send you what?

A. A receipt for cotton consigned on the through bill of lading and one plain copy of the through bill of lading, issued by them at the originating point. Then we would fill out these receipts or sign them in accordance with the mate's receipts, and then return two signed ones to the railway, keeping a plain copy and a copy of the through bill of lading to go forward with the ship to insure correct delivery at the port of discharge.

Q. A letter has been produced this morning, Mr. Warriner, dated October 18, 1894, from yourself to Mr. Wilkinson, marked "Ex. Z 1008." Will you be good enough to read it?

Witness reads as requested the letter referred to.

Q. Mr. Miller has testified, as I understand him, that there was a practice of loading cotton on your ships at Westwego for which he had received no regular transfers from your office. Do you know of such a practice?

A. The practice has been more general since the fire than before. It was not the practice before, according to my recollection. We are prepared to take any cotton at any time we have room for; receive it when it is delivered to the ship, and sign for it in the same way.

Thereupon Mr. Taggart read the letter of November 1st, 1894, produced by the witness and called for by plaintiff's counsel. The letter is as follows:

NOVEMBER 1ST, 1894.

C. G. Miller, Esq., T. & P. R'y:

S. S. "British Crown" left Westwego this morning after having taken 6,151 bales of cotton. We find, on comparing mate's receipts with cotton ordered that the deliveries to this ship have been of an unsatisfactory character. For instance, we discover that  
124 some 500 to 600 bales were delivered to the ship although not ordered by us. We have not signed transfers for this cotton. On the other hand, we find that bills of lading for about 600 bales, the transfers of which we sent you while the ship was loading, have been split and the cotton confused in the most extraordinary manner, to our great inconvenience and possible loss. Of course, we know that occasional splits sometimes are unavoidable in the height of the season, but we cannot find any excuse for such confusion as the deliveries to the S. S. "British Crown" show to exist, and shall be glad if you will make a special effort to straighten this matter out as soon as possible. The splitting of bills of lading is a cause of great complaint of consignees on the other side, and injures us very considerably. We therefore suggest, before any other cotton is loaded, some better system of delivery be perfected by you. Following the S. S. "British Crown" we propose to load the S. S. "Leyden" and the steamer "Imaum" at Westwego, the former due on the 5th and the latter about the 9th, so that there will be plenty of time for Westwego to prepare, with a view to avoiding repetitions of such disorderly deliveries as were made to the S. S. "British Crown."

Yours truly,  
(S'g'd)

ELDER, DEMPSTER & CO.

Also following questions and answers:

Q. Looking at the letter of November 12, 1894, from your company to the Texas and Pacific Railway Company, do you recollect, Mr. Warriner, whether, in addition to the transfers mentioned in that letter, you had then any other transfers on hand which had been sent to you by the Texas and Pacific Railway Company?

A. No, sir; I think we had cleared every one out of the office and sent them back to the T. & P. railroad. We had a good many ships at about that time—two or three of them, certainly—and were anxious to get ready for them.

125 Q. Do you recollect, Mr. Warriner, that, on November 12th, 1894, the "S. S. Leyden" went up to Westwego?

A. It was about that time—the time of the fire.

Q. Had she begun loading?

A. No, sir.

Q. Do you know what was the reason?

A. I don't know exactly, now, what was the reason. She was very late—she should have been in four or five days before that. She made a very long passage.

The plaintiff also called WALTER B. SPENCER, who testified as follows:

I am a lawyer practicing in New Orleans, and one of the attorneys for the defendant in this action. I have been at Westwego once or twice. My firm is Howe, Spencer & Cocke. I represented the Texas and Pacific Railway Company in the matter of the application to have the limits of the port of New Orleans extended. I only know from hearsay.

PRATT A. BROWN was called on behalf of the plaintiff and testified as follows:

I am an attorney-at-law, practicing in New York city. One of the assistants of the plaintiff's counsel in this matter. I have calculated the interest on the amount that Mr. Webber gave as the value of this cotton from the 5th of August, 1895. I make it \$1,286.65; making a total with the principal of \$14,068.

Plaintiff rests.

Mr. CLEVELAND: I move for the direction of a verdict in favor of the plaintiff and against the defendant for the amount stated by Mr. Brown. Calling your honor's attention to the fact that, under the admissions of the answer, the defendant received the cotton under the bills of lading in evidence, and that they were in the possession of the defendant at the time of its destruction, the defendant had the actual custody, and under the first clause that carrier alone shall be held liable therefor in whose actual custody the cotton shall be, the only pretense of delivery is a constructive delivery. It seems to me that that is not proved nor is there anything that could be held to be more than a semblance of proof of constructive delivery. But even the constructive delivery would not save the defendant, for, by express stipulation in the bill of lading, that carrier alone is liable in whose actual custody the cotton shall be at the time of such damage, detriment or loss. This being simply a question of delivery, it seems to me I have very little more to say.

Mr. TAGGART: I shall make a motion to direct a verdict for the defendant, and I have two grounds for my motion. My motion is based, first, on the ground that, under the authority of a decision of the Supreme Court of the United States, which I shall present to your honor covering this question, there was on the facts of this case an actual delivery to the steamship company. My second proposition is this: If your honor should be of the opinion that there is a differentiation if possible between this case and the Pratt case

(95 U. S.) under the facts, that then we come to another principle as to which the testimony is uncontradicted in this case, and that is that the Texas and Pacific Railway Company had carried this freight to its terminus, the point where it was to be delivered to the steamship company, and then had notified the steamship company that it was ready for delivery, and under the testimony produced had insisted upon the steamship company taking it away; and, under the principle of authorities of the Supreme Court of the United States and other Federal authorities, that, thereafter, it having discharged its duties and taken these steps, it was no longer responsible as a carrier, and would remain simply a warehouseman for the goods in its custody, and there being no proof whatever here of any negligence, so far as the defendant's custody was concerned, that the verdict must be for the defendant on this second ground.

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*Direction of Verdict.*

The COURT: The motions made to direct a verdict in this case are eminently proper, because, so far as I can see, there is no conflict of evidence for the jury to pass upon. There is a dispute between the witness Warrenner and some of the witnesses for the plaintiff; but it is not so much a dispute as to what the facts were as it is to what inferences the particular witnesses drew from the facts. It is a case, then, where the court should direct a verdict one way or the other.

The contract in suit provides that the defendant's part of the contract should be deemed to be fully performed upon delivery of the cotton to its next connecting carrier. This word "delivery" has given the courts a great deal of trouble. Possibly there is, perhaps, no one word about which more law has been laid down than about that word, delivery. Its meaning varies with the particular contract and with the peculiar circumstances attending the contract. But in this particular case, examining the bill of lading which embodies the terms of the contract between these parties, and giving to all the clauses which it contains their proper weight, and construing it as a whole, it seems impossible to escape the conviction that the word delivery is used in that contract with the meaning of a transfer of the *actual custody* of the goods from one carrier to another. It was quite appropriate that the transfer of actual custody should be made the test, because the perils to which goods may be exposed from flood or fire or pilfering or abstraction or what not—destruction of any kind—may vary, depending upon the particular custody in which such goods may be at the time. This contract, then, contemplates and expressly provides that the carrier who first receives the goods shall carry them forward to the end of its part of the route and there put them out of its actual custody into the actual custody of the next succeeding carrier. There is no provision, and I cannot  
 128 believe that it was in the contemplation of the parties, that by carrying to the end of the route and notifying the next carrier, without any notification to the shipper, the first carrier could change its relation to the shipper from that of carrier to that of

warehouseman. The very contingency of the failure or neglect or refusal of the second carrier to accept the goods from the first carrier is provided for, because it is left optional with the first carrier to send them forward by any other steamship line than the Elder-Dempster Steamship Company. I am clearly of the opinion, therefore, that under this particular contract, whatever the relations between the two carriers might be, whatever mutual rights or obligations might arise by reason of notices passing between them—as between the first carrier and the shipper the contract of carriage and the liability as a common carrier could be terminated only by the transfer of the actual custody from the first carrier to the second carrier, or by some notice brought home to the shipper of a modification of the contract.

The next question to be determined is whether there had been such transfer of actual custody in this particular case. The two authorities to which I have been particularly referred—*Pratt vs. Railway Co.* and the two Connecticut cases which are referred to therein—although they do not say so much about the ownership of the particular depot or wharf, do refer to such ownership as one of the elements of the decision, and I certainly cannot escape the conviction that it was an element of great importance in reaching the conclusion. In *Pratt against the Railway Co.*, 95th U. S., the first carrier ran the goods upon tracks into the depot of the second carrier and put them down into part of the depot which the second carrier had set apart as the place where goods that the first carrier wished to forward should be placed and received by the second carrier, the whole depot being the property of and under the control of the second carrier. They were undoubtedly and unquestionably, when delivered in the depot of the  
 129 second carrier at that particular place, put within the actual custody of the second carrier. In commenting on *Converse against The N. & N. Y. Transportation Company*, 33 Conn., the supreme court referred to the circumstances that both companies had equal possession of the depot, equal control and jurisdiction over the depot. Now in this particular case that we have before us, the wharf is the wharf of the railroad company. Of course, in the supposititious case put by Mr. Taggart, where the goods are delivered by the first carrier upon the wharf of the second carrier, there undoubtedly *there* would be a transfer of actual custody. So in the second supposititious case, where some particular part of the wharf of the first carrier had been set apart and put within the control of the second carrier, so that the management, the charge, the control, the disposition of that particular part of the wharf and the property on it were entirely with the second carrier, then also there would be a change of the actual custody. But I do not understand that the testimony makes out such a case here. The dock was the dock of the Texas and Pacific Railway Company. They deposited the goods upon the dock, and sent the transfer slip, and all these various documents passed. What was the condition of the goods put upon the dock from that time on, so far as the steamship company was concerned? As I understand the testimony, the steamship company

had no business to come there to move those goods from one part of the dock to another, nor to change the way in which they were placed upon that dock. They could come there during business hours and ask to have their goods pointed out to them; could then, by their employees, during business hours, at a time when the railroad company was willing that they should come, move the goods from the particular location to the steamer, giving a receipt for them. But aside from that I do not understand that they had any control over the goods. They certainly had no control over the dock as a dock. They had nothing to do as to determining whereabouts on the dock these goods were to be placed. If they  
130 were placed by post 29 when they arrived on Monday, they might be moved by the railroad company to post 43 on Tuesday, without the permission of the steamship company at all, without consulting the steamship company. *Per contra*, the steamship company could not move one bale on the dock from where it had been put to any other place on the dock. It could only move the goods from the dock to its ship, and then with the permission of the railroad company. Moreover, whatever windows or doors or skylights there might have been on the shed of the dock, whether they should be opened or closed was entirely within the control of the railroad company. How the cotton should be stacked upon the pier—whether in one, two, three or four tiers—whether it should be covered or not with tarpaulins—at what hours people should be allowed to come on the pier—who should be allowed to come—who should be kept off—what watchmen should be kept—what measures should be taken to protect the property from theft or contingencies of fire or flood—all those were wholly within the control of the Texas and Pacific Railroad Company, and as to any and all of them the steamship company had absolutely nothing to say whatever.

Under these circumstances I cannot escape the conviction that whatever may have been the relations established between these two companies by their course of dealing, by their contracts with each other, by the notices respectively given and the documents exchanged—of none of which the shipper had any information—so far as the shipper is concerned, the actual custody of those goods was not transferred from the first carrier to the second carrier until more was done to them than appears to have been done to these particular goods at the time of this fire.

Under those circumstances I feel constrained to direct a verdict in favor of the plaintiff for the full amount, denying the motion of the defendant on both grounds, with a separate exception on each ground and with an exception also to the direction in favor of the plaintiff. The amount of the verdict is \$14,068.

Stay of sixty days after entry of judgment.



131 E. H. L., April 12, 1897. EXHIBIT B. L. 1. (See *ante*, p. 22.)

B. L. 35.

(Copy.)

Form 3038.

The Texas & Pacific Railway Company.

*Export Cotton Bill of Lading.*

Received by the Texas & Pacific Railway Company, in apparent good order and well conditioned, of Castner & Co. for delivery to shippers' order or their assigns, at Liverpool, Eng., he or they paying freight and charges as per margin, the following articles, viz: 200 bales of cotton, described as follows:

Number.	Marks.	
Two hundred.....	TCUP.....	118 B/c
	OXFO.....	51 "
	SABO.....	16 "
	JAXO.....	15 "
		<hr/> 200

Notify Newall & Clayton.

Bill of lading No. 35.

T. & P. contract No. 44.

R. R. contract No. —.

S. S. line contract No. —.

From Bonham, Texas, to Liverpool, Eng. Route: Via New Orleans & Elder & Dempster steamship line.

Gross weight at point of shipment, pounds 106,662. Through rate per 100 lbs., 111 cts., one hundred & eleven cts.

Exchange at \$4.80 per pound sterling.

Total freight, \$—.

Advance charges, \$—.

The terms and conditions hereof are understood and accepted by the owner.

132 Upon the following terms and conditions, which are fully assented to and accepted by the owner, viz:

1. That the liability of the Texas and Pacific Railway Company, in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual cus-

tody the cotton shall be at the time of such damage, detriment or loss.

2. That the rate of freight for transportation of said cotton, specified in the margin hereof, is quoted and guaranteed with the distinct understanding and only on condition that the weight of said cotton is truly and correctly represented and stated; that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind the Texas & Pacific Railway Company to transport or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but shall only bind said company to protect said rate.

3. That the said cotton is subject, at the owner's cost, to the necessary repairs and baling; and the consignee- are to pay freight and charges on said cotton in lots or parts of lots as delivered.

4. That if said cotton or any part thereof shall be lost, damaged or destroyed by means or under circumstances rendering the Texas & Pacific Railway Company, or any connecting carrier, liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby. It is expressly agreed and understood that the recitation in this bill of lading, that the cotton was received "in apparent good order and well conditioned," refers only to its external appearance, and if the said cotton is found damaged at the point of delivery, the burden of proof shall be upon the owner of said cotton, or the claimant for damages, to show, affirmatively, that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted as when received by it.

5. It is further agreed that in case said cotton is found at point of delivery to have been injured by any of the excepted clauses specified in this bill of lading, the burden of proof shall be upon the owner of said cotton, or claimant, to establish that such injury resulted from the fault of the carrier.

6. That the said cotton shall be transported from the port of New Orleans to the port of Liverpool Eng. by the Elder, Dempster & Co. steamship line, with liberty to ship by any other steamship  
133 or steamship line; and upon delivery of said cotton to said ocean carrier at the aforesaid port this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be transported; and upon delivery of said cotton, at usual place of delivery of the steamship or steamship lines carrying the same, at the port of destination the responsibility of the carriers shall cease.

In witness whereof the agent signing for the railway and steamship or steamship lines hath affirmed to three bills of lading of this

tenor and date, one of which being accomplished, the others to stand void.

Dated at Bonham, Texas, the 15th day of October, 1894.

J. M. BOOTH,

*Agent, Severally, but not Jointly.*

Endorsed:

Castner & Co.

R. T.

T.C., March 23, 1897.

134 E. H. L., Apr. 12, 1897. EXHIBIT B. L. 2. (See p. 22, *ante*).

(Copy.)

B. L. 61.

The Texas & Pacific Railway Company.

*Export Cotton Bill of Lading.*

Received by the Texas & Pacific Railway Company, in apparent good order and well conditioned, of Castner & Co. for delivery to shippers' order or their assigns, at Liverpool, Eng., he or they paying freight and charges as per margin, the following articles, viz: 100 bales of cotton, described as follows:

Number.	Marks.	
One hundred.....	OXFO.....	51 B/c
	JAXO.....	27 "
	QBEE.....	22 "
		<hr/> 100

Notify Newall & Clayton.

Delivery order granted for OXFO twenty-five bales cotton per "Mexico." Elder, Dempster & Co., 5/2/95, per H. P. Reynolds.

Bill of lading No. 61.

T. & P. contract No. 44.

R. R. contract No. —.

S. S. line contract No. —.

From Bonham, Texas, to Liverpool, Eng. Route: Via New Orleans & Elder, Dempster & Co. steamship line.

Gross weight at point of shipment, pounds 53,633. Through rate per 100 lbs., 111 cts., one hundred & eleven cts.

Exchange at \$4.80 per pound sterling.

Total freight, \$—.

Advance charges, —.

The terms and conditions hereof are understood and accepted by the owner.

135 Upon the following terms and conditions, which are fully assented to and accepted by the owner, viz:

1. That the liability of the Texas and Pacific Railway Company, in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or

sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment or loss.

2. That the rate of freight for transportation of said cotton, specified in the margin hereof, is quoted and guaranteed with the distinct understanding and only on condition that the weight of said cotton is truly and correctly represented and stated; that said rate only includes the charge for transportation, and the specification of such rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind the Texas & Pacific Railway Company to transport or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but shall only bind said company to protect said rate.

3. That the said cotton is subject, at its owner's cost, to the necessary repairs and baling; and the consignee are to pay freight and charges on said cotton in lots or parts of lots as delivered.

4. That if said cotton or any part thereof shall be lost, damaged or destroyed by means or under circumstances rendering the Texas & Pacific Railway Company, or any connecting carrier, liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby. It is expressly agreed and understood that the recitation in this bill of lading, that the cotton was received "in apparent good order and well conditioned," refers only to its external appearance, and if the said cotton is found damaged at the point of delivery, the burden of proof shall be upon the owner of said cotton, or the claimant for damages, to show, affirmatively, that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted as when received by it.

5. It is further agreed that in case said cotton is found at point of delivery to have been injured by any of the excepted clauses specified in this bill of lading, the burden of proof shall be upon the owner of said cotton, or claimant, to establish that such injury resulted from the fault of the carrier.

6. That the said cotton shall be transported from the port of New Orleans to the port of Liverpool Eng. by the Elder, Dempster & Co. steamship line, with liberty to ship by any other steamship  
136 or steamship line; and upon delivery of said cotton to said ocean carrier at the aforesaid port this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be transported; and upon delivery of said cotton, at usual place of delivery of the steamship or steamship lines carrying the same, at the port of destination the responsibility of the carriers shall cease.

witness whereof the agent signing for the railway and steamship or steamship lines hath affirmed to three bills of lading of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Bonham Texas the 23rd day of Oct. 1894.

J. M. BOOTH,  
*Agent Severally, but not Jointly.*  
K & Co. No. 63918.

Endorsed :

Castner & Co.  
Newall & Clayton.

R. T.  
T. C. March 23, 1897.

137 E. H. L., April 12, 1897. EXHIBIT B. L. 3. (See p. 22, ante.)

B. L. 28.

(Copy.)

Form 3038.

The Texas & Pacific Railway Company.

*Export Cotton Bill of Lading.*

Received by the Texas & Pacific Railway Company, in apparent good order and well conditioned, of Castner & Co. for delivery to shippers' order or their assigns, at Liverpool, Eng., he or they paying freight and charges as per margin, the following articles, viz: — bales of cotton, described as follows:

Number.	Marks.	
One hundred.....	CARL.....	38 B/c
	OATS.....	54 "
	TCUP.....	8
		<hr/> 100

Notify Newall & Clayton.

M. B. of C. No. 1498 New York.

Delivery order granted for TCUP. eight bales cotton p. "Mexico"  
5/2/95 Elder, Dempster & Co. per H. P. Reynolds.

Bill of lading No. 28.

R. R. contract No. —.

T. & P. contract No. 44.

S. S. contract No. —.

From Bonham, Texas, to Liverpool, Eng. Route: Via New Orleans  
& Elder, Dempster & Co. steamship line.

Gross weight at point of shipment, pounds 51,528. Through rate  
per 100 lbs., 111 cts., one hundred & eleven cts.

Exchange at \$4.80 per pound sterling.

Total freight, \$—.

Advance charges, \$—.

The terms and conditions hereof are understood and accepted by  
the owner.

138 Upon the following terms and conditions, which are fully  
assented to and accepted by the owner, viz:

1. That the liability of the Texas and Pacific Railway Company, in respect to said cotton, and under this contract, is limited to its own line of railway, and will cease, and its part of this contract be fully performed upon delivery of said cotton to its next connecting carrier; and in case of any loss, detriment or damage done to or sustained by said cotton before its arrival and delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment or loss.

2. That the rate of freight for transportation of said cotton, specified in the margin hereof, is quoted and guaranteed with the distinct understanding and only on condition that the weight of said cotton is truly and correctly represented and stated; that said rate only includes the charge for transportation, and the specification of said rate shall not be taken as any guide for construction or evidence to extend this contract in other respects, or to bind the Texas & Pacific Railway Company to transport or to become in anywise responsible for said cotton after delivery thereof to its next connecting carrier, but shall only bind said company to protect said rate.

3. That the said cotton is subject, at its owner's cost, to the necessary repairs and bailing; and the consignee, are to pay freight and charges on said cotton in lots or parts of lots as delivered.

4. That if said cotton or any part thereof shall be lost, damaged or destroyed by means or under circumstances rendering the Texas & Pacific Railway Company, or any connecting carrier, liable therefor, the damages recoverable therefor shall be computed at its value at the time and place of shipment, as evidenced hereby. It is expressly agreed and understood that the recitation in this bill of lading, that the cotton was received "in apparent good order and well conditioned," refers only to its external appearance, and if the said cotton is found damaged at the point of delivery, the burden of proof shall be upon the owner of said cotton, or the claimant for damages, to show, affirmatively, that the cotton was actually in good order and well conditioned when receipted for, it being understood that the carrier only obligates itself to deliver said cotton in like order and condition to the consignee, the unavoidable wear and tear and deterioration in due course of transportation only excepted as when received by it.

5. It is further agreed that in case said cotton is found at point of delivery to have been injured by any of the excepted clauses specified in this bill of lading, the burden of proof shall be upon the owner of said cotton, or claimant to establish that such injury resulted from the fault of the carrier.

6. That the said cotton shall be transported from the port of New Orleans to the port of Liverpool, Eng., by the Elder, Dempster & Co. steamship line, with liberty to ship by any other  
139 steamship or steamship line; and upon delivery of said cotton to said ocean carrier at the aforesaid port this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and



master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be transported; and upon delivery of said cotton, at usual place of delivery of the steamship or steamship lines carrying the same, at the port of destination the responsibility of the carriers shall cease.

In witness whereof the agent signing for the railway and steamship or steamship lines hath affirmed to three bills of lading of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Bonham, Texas, the 10th day of Oct., 1894.

J. M. BOOTH,

*Agent Severally, but not Jointly.*

Endorsed:

Castner & Co.

R. T.

Newell & Clayton.

T. C., March 23, 1897.

140 E. H. L., Apr. 12, 1897. EXHIBIT B. L. 4. (See p. 22, ante.)

B. L. 29.

(Copy.)

Form 3038.

The Texas & Pacific Railway Company.

*Export Cotton Bill of Lading.*

Received by the Texas & Pacific Railway Company, in apparent good order and well conditioned, of Castner & Co. for delivery to shippers' order or their assigns, at Liverpool, Eng., he or they paying freight and charges as per margin, the following articles, viz: 100 bales of cotton, described as follows:

Number.	Marks.	
One hundred.....	JPAN.....	66 B/c
	TCUP.....	12 "
	SABO.....	22
		<hr/>
		100

Notify Newell & Calyton.

M. B. of C. No. 1497 New York.

Bill of lading No. 29.

T. & P. contract No. 44.

R. R. contract No. —.

S. S. line contract No. —.

From Bonham, Texas, to Liverpool, Eng. Route: Via New Orleans & Elder, Dempster & Co. steamship line.

Gross weight at point of shipment, pounds 53,304. Through rate per 100 lbs., 111 cts., one hundred & eleven cts.

Exchange at \$4.80 per pound sterling.

Total freight, \$—.

Advance charges, \$—.

The terms and conditions hereof are understood and accepted by the owner.

Upon the following terms and conditions, which are fully as-  
sented to and accepted by the owner, viz:

141 1. That the liability of the Texas and Pacific Railway Com-  
pany, in respect to said cotton, and under this contract, is  
limited to its own line of railway, and will cease, and its part of this  
contract be fully performed upon delivery of said cotton to its next  
connecting carrier; and in case of any loss, detriment or damage  
done to or sustained by said cotton before its arrival and delivery  
at its final destination, whereby any legal liability is incurred by  
any carrier, that carrier alone shall be held liable therefor in whose  
actual custody the cotton shall be at the time of such damage, det-  
riment or loss.

2. That the rate of freight for transportation of said cotton, speci-  
fied in the margin hereof, is quoted and guaranteed with the distinct  
understanding and only on condition that the weight of said cotton  
is truly and correctly represented and stated; that said rate only  
includes the charge for transportation, and the specification of said  
rate shall not be taken as any guide for construction or evidence to  
extend this contract in other respects, or to bind the Texas & Pacific  
Railway Company to transport or to become in anywise responsible  
for said cotton after delivery thereof to its next connecting carrier,  
but shall only bind said company to protect said rate.

3. That the said cotton is subject, at its owner's cost, to the neces-  
sary repairs and baling; and the consignee- are to pay freight and  
charges on said cotton in lots or parts of lots as delivered.

4. That if said cotton or any part thereof shall be lost, damaged  
or destroyed by means or under circumstances rendering the Texas  
& Pacific Railway Company, or any connecting carrier, liable  
therefor, the damages recoverable therefor shall be computed at its  
value at the time and place of shipment, as evidenced hereby. It  
is expressly agreed and understood that the recitation in this bill of  
lading, that the cotton was received "in apparent good order and  
well conditioned," refers only to its external appearance, and if the  
said cotton is found damaged at the point of delivery, the burden  
of proof shall be upon the owner of said cotton, or the claimant for  
damages, to show, affirmatively, that the cotton was actually in  
good order and well conditioned when receipted for, it being under-  
stood that the carrier only obligates itself to deliver said cotton in  
like order and condition to the consignee, the unavoidable wear and  
tear and deterioration in due course of transportation only excepted  
as when received by it.

5. It is further agreed that in case said cotton is found at point of  
delivery to have been injured by any of the excepted clauses speci-  
fied in this bill of lading, the burden of proof shall be upon the  
owner of said cotton, or claimant, to establish that such injury re-  
sulted from the fault of the carrier.

6. That the said cotton shall be transported from the port of New  
Orleans to the port of Liverpool, Eng., by the Elder, Dempster & Co.  
steamship line, with liberty to ship by any other steamship  
142 or steamship line; and upon delivery of said cotton to said  
ocean carrier at the aforesaid port this contract is accomplished,

and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be transported; and upon delivery of said cotton, at usual place of delivery of the steamship or steamship lines carrying the same, at the port of destination the responsibility of the carriers shall cease.

In witness whereof the agent signing for the railway and steamship or steamship lines hath affirmed to three bills of lading of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Bonham, Texas, the 10th day of Oct., 1894.

J. M. BOOTH,

*Agent Severally, but not Jointly.*

Endorsed:

Castner & Co.

R. T.

T. C. March 23, 1897.

143 E. H. L., Apr. 12, 1897. EXHIBIT C. (See p. 22, *ante*.)

United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON EARLE  
*against*

THE TEXAS AND PACIFIC RAILWAY COMPANY.

DE FOUBLANQUE PENNEFATHER

*against*

THE TEXAS AND PACIFIC RAILWAY COMPANY.

ARTHUR BOWER FORWOOD, ERNEST HARRISON FORWOOD, and HAROLD STANLEY FORWOOD  
*against*

THE TEXAS AND PACIFIC RAILWAY COMPANY.

PHILIPP CORNELIUS HEINEKEN and JOHANNES VOGELSANG  
*against*

THE TEXAS AND PACIFIC RAILWAY COMPANY.

& thirty-nine other cases.

It is hereby stipulated between the parties hereto,

144 First. That the bills of lading which are marked R. T. and T. C., March 23rd, 1897, were, on the day of their respective dates, duly issued and delivered by the defendant to the shippers therein named, at the place therein stated as the place of dates.

Second. For the purposes of arriving at the value at the place of shipment, at the date of the bill of lading, of any of the cotton included in any of the forty-three (43) actions pending in this court against the Texas and Pacific Railway Company, arising out of the fire at Westwego on November 12, 1894.

The weight given on each of the bills of lading as the aggregate

weight of all the bales of cotton therein stated to have been shipped, shall be divided by the number of bales of cotton therein stated to have been shipped, and the result shall be taken as the weight per bale. In case of a total loss of the cotton described in the original invoices, in possession of the plaintiffs' attorneys, the grades shall be taken to be as described in said invoices, and the value of said grades of cotton shall be determined as hereinafter set forth.

In case a portion only of the cotton in any invoice shall have been destroyed, and it is not possible to definitely identify the particular bales of cotton destroyed, then the cotton destroyed shall be considered to be the lowest grade shown on the invoice on which such destroyed cotton appears.

The prices, per pound, of such grades shall be the New Orleans price current at the date of the bill of lading for such grades of cotton, less the amount of rail freight from shipping point to New Orleans, fixed and agreed for this purpose at seventy-five (75) cents per hundred pounds,—such New Orleans price current to be fixed by the secretary of the cotton exchange at New Orleans, or by the secretary of the cotton exchange at New York.

Third. The plaintiffs' attorneys shall furnish to defendant's attorneys copies of the invoices covering the four cases now on the calendar, on or before the 31st of March, and copies of invoices 145 covering the remainder of the suits within a seasonable time thereafter, and at least four weeks before any of said cases shall be moved for trial.

Fourth. The trial of these cases shall be set for the second Monday of April, 1897, provided that the adjournment of the trial of the cases beyond the day when they are first called for trial shall not interfere with their trial on such second Monday of April, 1897.

Dated New Orleans, March 23rd, 1897.

EVARTS, CHOATE & BEAMAN,  
*Plaintiffs' Attorneys.*  
RUSH TAGGART, *Defendant's Attorney.*

E. H. L., April 12, 1897. EXHIBIT D 1. (See p. 22, ante.)

Order dated Oct. 10th, 306 B/C; Oct. 11th, 100 B/C.

Invoice of 400 bales of cotton shipped today by Castner & Co. from Bonham, Tex., to Liverpool via New Orleans and consigned to order for account and risk of consignment to Messrs. Newall & Clayton.

Basis—300 at  $3\frac{5}{8}$ , 100 at  $3\frac{3}{8}$ — $1\frac{1}{8}$ d. added for  $1\frac{1}{8}$  at  $1\frac{1}{8}$  staple;  $1\frac{1}{8}$ d. added for  $1\frac{1}{8}$  at  $1\frac{1}{8}$  staple.

JPAN	6 B/C Fy G Mid	$1\frac{1}{8}$ — $1\frac{1}{8}$ .....	3228	at $3\frac{1}{8}$ ..	11197d.
TCUP	187 " G Mid	".....	98617	$3\frac{1}{8}$ ..	335914
GFOX	107 " Fy Mid	".....	55840	$3\frac{1}{8}$ ..	186715
QBEE	22 " Mid	".....	11614	} $3\frac{7}{8}$ ..	84074
JAXO	27 " Fy Mid	$1\frac{1}{8}$ — $1\frac{1}{8}$ .....	14506		
OXFO	51 " G Mid	".....	27513		
	400		211318	$3\frac{3}{8}$ ..	90277
					708177d.
		Less 6%			42490
					665687d. £2773 13 11

Less freight.....	157685 at 112 56d...	367 18 8	
".....	53633 111 55½ ..	124 0 6	
			491 19 2
Commissions at ½ % .....		11 8 2	
Bank com'n at ¼ % .....		5 13 6	
			509 0 10

Amount our draft at 60 D/S upon Messrs. Dennistown, Cross & Co. .... £2264 13 1

Insured in Thames & Mersey for \$12,000.00.

E. & O. E.	PCUP 5	Euskaro	Dec. 3
Bonham Tex. Oct. 24th 1894.	GFOX 10	do.	3
	GFOX 25	Bellarder	" 23
	PCUP 160	do.	23

CASTNER & CO.

146 E. H. L., Apr. 12, 1897. EXHIBIT D 2. (See p. 22, ante.)

Order dated Oct. 1st.

Invoice of 100 bales of cotton shipped today by Castner & Co. from Bonham, Texas, to Liverpool, Eng., via New Orleans and consigned to order for account and risk of consignment to Newall & Clayton.

Basis mid good Cp 3 $\frac{3}{8}$  to 1 $\frac{3}{8}$  added for staple.  
½d. difference on full grades.

JPAN 66 B/C Fy G M 1½ to 1½.....	34796	at 3 $\frac{3}{8}$ ..	123961
TCUP 12 " G M " .....	6561	} at 3½ ..	64778
SABO 22 " Fy " 1½ " 1½.....	11947		
	53304		188739
Less 6% .....			11324
			177415
			£739 4 7
Less freight at 111 = 55½d. on 53304.....	£123	5 4	
Commis. at ½ % .....	3	1 7	
Bk. " " ¼ " .....	1	10 7	
			127 17 6

Amount our d'ft at 60 d/s upon Mess. Dennistown, Cross & Co. .... £611 7 1

E. & O. E.  
Bonham Texas Oct. 10, 1894.  
Insured in Thames & Mersey for \$3,300.00.

CASTNER & CO.,  
By W.

147 E. H. L., April 12, 1897. EXHIBIT D 3. (See ante, p. 22.)

Order dated Oct. 4.

Invoice of 100 bales of cotton shipped today by Castner & Co. from Bonham, Texas, to Liverpool, Eng., via New Orleans and consigned to order for account and risk of consignment to Newall & Clayton.

Basis mid good Cp 3½ to 1½d. added for staple.  
½d. diff. on full grades.

Selected cottons.

CARL 38 Fy G M 1½ to 1½.....	19561 at 3 $\frac{3}{8}$ ..	69686d.
OATS 54 " " 1½ " 1½.....	27750 " 3½ ..	97125
TCUP 8 " " 1½ " 1½.....	4217 at 3½ ..	14496
	51528	181307
Less 6% .....		10878
		170429
		£710 2 5

Less freight at 111 = 55½d. on 51528.....	£119 3 2	
Commis. at ½% .....	2 19 1	
Bk. " " ¼ .....	1 9 5	
		123 11 8

Amount our d't at 60 d/s upon Mess. Dennistown, Cross & Co. £586 10 9

E. & O. E.

Bonham Texas Oct. 10, 1894.

Insured in Thames & Mersey for \$3,100.00.

CASTNER & CO.,

By W.

148 E. H. L., Apr. 12, 1897. EXHIBIT D 4. (See p. 22, ante.)

Order dated Oct. 12.

Invoice of 200 bales of cotton shipped today by Castner & Co. from Bonham, Texas, to Liverpool, Eng., via New Orleans and consigned to order for account and risk of consignment to Newall & Clayton.

Basis mid good Cp 3½ 1½ to ¾ added for staple.  
½d. difference on full grades.

TCUP	118	B/C	good	mid	1½	to	¾	.....	62438	at	3½	=	210728d.
SABO	16	"	Fy	"	1½	"	¾	.....	8410	"	3½	=	28646
OXFO	51	"	good	"	"	"	"	.....	27633	"	3½	=	92397
JAXO	15	"	Fy	mid	"	"	"	.....	8181	"	3½	=	26844
	200								106662				356615
									Less 6% .....				21516
													337099 £1404 11 7
Less freight at 111 = 55½d.....													£246 13 1
Commis. " ½% .....													5 15 9
Bk. " " ¼ .....													2 17 7
													255 6 5

Amount our d't upon Mess. Dennistown, C. & Co. at 60 d/s.... £1149 5 2

Insured in Thames & Mersey for \$6,200.

E. & O. E.

Bonham Texas Oct. 15th 1894.

CASTNER & CO.,

By W.

Exhibit E, schedule of prices (not printed). (See stipulation, p. 155.)



E. H. L., Apr. 13, 1897. EXHIBIT D'F-T Z 1, W. B. (See ante, p. 85.)  
Form 1126.†

The Texas & Pacific Railway Co.

W. B. No. 558.

*Cotton Waybill.*

Car No. —.

From Bonham to New Orleans, La., Oct. 25, 1894, via Te. Jct. & Marshall. Whose car, T. & P., B 1.

When the rates charged for transportation are less than tariff, the number of special authorizing such rate must be stated in the waybill.

Consignor.	Consignee and destination.	Bill of lading.			Number bales forwarded on this W. B.	Marks and tag Nos.	Weight.	Rates.	Freight.	Charges.	Prepaid.	Total to pay.
		No. bales signed for.	Date of B. L.	Number of B. L.								
Castner & Co.	Shippers' order Notify Newall & Clayton Liverpool Eng. Dempster & Co.	100	10/10	28	25	C P OATS 5089/5113	125.00 Comp. S. S.	6073 5179 10 4911	64 73		13 70	64 73
		11,997	Actual	Gross invoice W. P.	Contract	No. 44.	Compress	at	Honey Grove.			
		S. S. line										
Via Elder		1,797										
	Transferred at Lamar Compress											
	from car. ....											
	to " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " " 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150 E. H. L., Apr. 18, 1897. EXHIBIT D'F'T Z 27, W. B. (See p. 86, ante.)

Form 30124.

No. Post, 22.

Receipt for Cotton Delivered.

Received from the Texas and Pacific Railway Co., in good order, New Orleans, 10/30, 1894.

No. 1367.

Date of W. B.	No. of W. B.	No. of car.	Where from.	Shipper.	Consignee.	No. of bates.	Marks and tag numbers.	Weight.	Rate.	Charges.	Freight.	Remarks.
10/24	535	T. & P. 3206	Bonham. B/L Co. 100 B/C	Castner & Co. o/n	Newall & Clayton Liverpool	2 2 O K	O. X. F. O. J. A. X. O. John Sanborn		10-31-'94			1802 O K
			Seal 112 J. M. 894		Via	E. D.	Post 22 line					

D'r'r Z 54, W. B. (See ante, p. 86.)

Form 1108.

E D and Co.

Sheet No. 1789.

The Texas and Pacific Railway Co.

Memorandum of freight transferred and delivered to the — railway at Westwego station this 1st day of Nov., 1894, in good order and condition (unless otherwise noted), to be forwarded as indicated hereunder.

Waybill.	Date.	No.	Car No. and initial.	Expense bill No.	Where from and shipper.	Consignee and desti- nation.	Articles.	Weight.	Rates.		Freight.	Charges.	Total to pay.	Prepaid.
									Through.	Local.				
10/25	559	2972 T. & P.	12014 4664	Bonham, Castner & Co.	Shipper's order Notify Newell and Clayton Liverpool, Eng.		18 B/c.... O A T S .. B/L 28.... Cont. 44—	9,000	51 79 10 49 21	..... ..... .....	46 64	9 00	55 64	
10/26	543	"	12012 900 1378	Honey Grove.	B									

I hereby certify transfer to have been made, as per memorandum above.

— — —, Agent.

JOHN HENRY CLAYTON ET AL.

152 E. H. L., Apr. 13, 1897. EXHIBIT DEF'T EX. Z 1026, W. B.  
(See p. 107, *ante*.)

Board of harbor masters, port of New Orleans, 187 Gravier street,  
room No. 5.

Ed. L. Cope, lower city limit to Canal St.

E. D. Dean, Canal to Henderson Sts.

Geo. Buchert, Henderson to Jackson Sts.

John J. Fitzgerald, Jackson St. to Southport.

Ed. L. Cope, president. John Davidson, sec'y and treasurer.

*Port Regulations Applying to Westwego Wharves, Westwego, La.*

#### Port of New Orleans.

First. The harbor master has authority by law to regulate, moor and station all vessels at the wharf and to remove them from time to time to make room for others and the degree of accommodation which one vessel shall afford to another, the harbor master is constituted sole judge.

Second. Vessels coming to the wharf must have their yards braced sharp up by the port braces, their port anchor on the fore-castle and their starboard anchor cocked billed, or at the hawse ready to let go. Boats, bumpkins and davits to be rigged inboard.

Third. Jib-booms must be rigged in the full length before  
153 landing, and no jib-booms shall be rigged out unless by  
permission from the harbor master and then at their own  
risk.

Fourth. Any person cutting or interfering with the moorings of any vessels will be punished according to law.

Fifth. Any person throwing ballast, rubbish or anything that will sink into the river will be punished according to law.

Sixth. The heating of pitch, tar or rosin is strictly prohibited on board any vessel lying at the wharf.

Seventh. Vessels will not anchor at or near the wharves without permission of the harbor master.

Eighth. No vessel shall change her berth without permission of the harbor master.

Ninth. Masters of vessels failing to comply with the above rules will be held responsible for all damages in consequence, besides laying themselves liable under the law.

Tenth. And in the absence of the harbor master the superintendent in charge is authorized to enforce these regulations, and to designate what accommodation which one vessel shall afford to another in conducting their business.

By order of the—

BOARD OF HARBOR MASTERS.

ED. L. COPE, *President*.

Adopted Jan. 10th, '94.

4

SCHEDULE A REFERRED TO IN STIPULATION, P. 155.

*Abstract Showing Car Nos., Date of Arrival at Westwego, and Dates of Unloading.*

The foregoing contains all the evidence offered or given on the trial of the cause and upon the application of the defendant this bill of exceptions is allowed by me and ordered to become part of the record in this cause at the term aforesaid, and he filed *nunc pro tunc* as of the 14th day of April, 1897, on this — day of —, 1897.

*United States Circuit Judge.*

155 It is hereby stipulated and agreed that the foregoing bill of exceptions contains all the evidence offered or given upon the trial of this cause, and that the same may be signed by the judge, and be filed *nunc pro tunc* as of April 14th, 1897.

It is also stipulated that "Exhibit E," schedule of prices, and that the waybills, skeleton sheets, transfer sheets and master's receipts referred to in the bill of exceptions and offered in evidence, and also entries in the books of the arrival of cars other than the

abstract presented herewith and marked "Schedule A," need not be printed, but the originals may be read or referred to upon the argument of the cause by either party if desired.

July 27, 1897.

EVARTS, CHOATE & BEAMAN,  
*Attorneys for Plaintiffs.*  
RUSH TAGGART, *Attorney for Defendant.*

(Endorsed :) U. S. circuit ct., so. dist. of N. Y. John Henry Clayton *et al.* vs. The Texas and Pacific Railway Company. Bill of exceptions. Rush Taggart, defendant's attorney, 195 Broadway, New York city. U. S. circuit court. Filed Aug. 5, 1897, *nunc pro tunc* as of 14 April, 1897. John A. Shields, clerk.

156 United States Circuit Court, Southern District of New York.

JOHN HENRY CLAYTON, Plaintiff,  
*vs.*

TEXAS AND PACIFIC RAILWAY COMPANY, Defendant. }

It is hereby stipulated and agreed that the exhibits as printed in the bill of exceptions in the above-entitled action may constitute the record of said exhibits in said action.

Dated New York, July 29th, 1897.

EVARTS, CHOATE & BEAMAN,  
*Plaintiff's Attorneys.*  
RUSH TAGGART, *Defendant's Attorney.*

(Endorsed :) Circuit court of the United States for the southern district of New York. John Henry Clayton, plaintiff, *vs.* Texas & Pacific Railway Company, defendant. Stipulation as to exhibits. U. S. circuit court. Filed Aug. 5, 1897. John A. Shields, clerk.

157 Circuit Court of the United States for the Southern District of New York.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON Earle

*vs.*

THE TEXAS AND PACIFIC RAILWAY COMPANY. }

*Assignment of Errors.*

Afterwards, to wit, at the same term at which the above-entitled suit was tried and judgment therein rendered, comes said defendant, by Rush Taggart, its attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

First. The court erred in denying the motion of the defendant to direct a verdict in favor of the defendant when the plaintiffs rested their case.

Second. That the court erred in directing a verdict for the plaintiffs.



Third. That the court erred in refusing to direct a verdict for the defendant at the conclusion of the testimony, upon the ground that the testimony showed that there had been a delivery of the cotton sued for to the connecting carrier, the Elder, Dempster & Company line of steamers.

Fourth. That the court erred in refusing to direct a verdict for the defendant at the conclusion of the testimony, upon the ground that the defendant's relation to the plaintiffs was that of warehouseman and not that of common carrier.

Wherefore, the defendant prays that the judgment entered herein may be set aside and reversed and that a judgment in favor of this defendant herein be entered as prayed in its answer.

RUSH TAGGART,

*Attorney for Defendant, No. 195 Broadway, New York City.*

(Endorsed :) U. S. circuit court. Texas and Pacific Railway Co. *et al.*, plaintiffs in error, against John Henry Clayton *et al.*, defendants in error. Assignment of errors. Rush Taggart, attorney for pl'ff in error, 195 Broadway, New York. John F. Dillon, counsel. U. S. circuit court. Filed Jul- 22, 1897. John A. Shields, clerk.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, )  
and Charles Anderson Earle )

*vs.*

THE TEXAS AND PACIFIC RAILWAY COMPANY. )

Bond for Damages  
and Costs.

Know all men by these presents that we, the Texas and Pacific Railway Company, as principal, and the National Surety Company, having an office and principal place of business at No. 346 Broadway, in the city of New York, county and State of New York, as surety, are held and firmly bound unto the above-named John Henry Clayton, Nicholas Roberts and Charles Anderson Earle in the sum of thirty thousand (\$30,000) dollars, to be paid to the said John Henry Clayton, Nicholas Roberts and Charles Anderson Earle, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 1st day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, the above-named the Texas and Pacific Railway Company, is about to prosecute a writ of error to the United States circuit court of appeals for the second circuit, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York :

Now, therefore, the condition of this obligation is such, that if the above-named Texas and Pacific Railway Company shall prosecute said writ of error to effect and answer all damages and costs, if it

fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

By C. E. SATTERLEE, [SEAL.]

*Sec'y and Treas.*

NATIONAL SURETY COMPANY,

By CHAS. A. DEAN, *President*. [SEAL.]

Sealed and delivered and taken and acknowledged this first day of July, 1897, before me—

E. A. JACKSON.

Attest: RUFFIN A. SMITH, *Secretary*.

160 CITY AND COUNTY OF NEW YORK, ss:

On this first day of July, 1897, before me personally appeared Chas. A. Dean, president of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of New York; that he is the president of the National Surety Company; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as president of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 720, of New York Session Laws of 1893. And the said Chas. A. Dean further said that he is acquainted with Ruffin A. Smith and knows him to be the secretary of said company; that the signature of the said Ruffin A. Smith subscribed to the said instrument is in the genuine handwriting of the said Ruffin A. Smith and was thereunto subscribed by the like order of the said board of directors and in the presence of him, the said Chas. A. Dean, president.

JOHN E. MOONEY,

[SEAL.]

*Notary Public, Kings Co.*

Certificate filed in New York Co.

(*Copy of By-law.*)

Be it remembered that at a regular meeting of the board of directors of the National Surety Company, duly called and held on the twentieth day of May, 1897, a quorum being present, the following by-law was adopted:

161 "Article XIII. SEC. 1. All bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, shall be signed by the president, the vice-president, the second vice-president, a resident vice-president, or an attorney-in-fact, and, except when signed by an attorney-in-fact shall have the seal of the company affixed thereto, duly attested by the secre-

tary, assistant secretary, or a resident assistant secretary. The vice-president, second vice-president and resident vice-presidents shall each have authority to sign such instruments whether the president be absent or incapacitated or not; and the assistant secretary and resident assistant secretaries shall each have authority to seal and attest such instruments, whether the secretary be absent or incapacitated or not. All such instruments executed as herein provided shall be as binding upon the company as if the same were signed by the president, duly sealed and attested by the secretary."

CITY AND COUNTY OF NEW YORK, ss:

I, Ruffin A. Smith, secretary of the National Surety Company, have compared the foregoing by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom and of the whole of said original by-law.

Given under my hand and the seal of the company at the city of New York this first day of July, 1897.

[SEAL.]

RUFFIN A. SMITH, *Secretary*.

Approved as to form, and also as to sufficiency of sureties, with reservation, however, to the defendants in error of the right at any time to examine the proper officers of the surety company under oath, touching its assets, liabilities and financial condition generally.

July 21, 1897.

E. H. LACOMBE,

*U. S. Circuit Judge.*

162 (Endorsed :) U. S. circuit court. John Henry Clayton & o'rs vs. The Texas and Pacific Railway Co. Bond on writ of error. Surety. National Surety Co. U. S. circuit court. Filed Jul-22, 1897. John A. Shields, clerk.

United States Circuit Court for the Southern District of New York.

JOHN CLAYTON ET AL.

*against*

THE TEXAS AND PACIFIC RAILWAY COMPANY. }

To John Henry Clayton, Nicholas Roberts, Charles Anderson Earle, and Evarts, Choate & Beaman, their attorneys, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the second circuit, at New York, on the 19th day of August, 1897, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness Hon. E. Henry Lacombe, judge of the circuit court of the  
 United States for the southern district of New York, this  
 163 21st day of July, in the year of our Lord one thousand eight  
 hundred and ninety-seven.

E. H. LACOMBE,  
*United States Circuit Judge.*

Service of a copy of this citation is hereby acknowledged this 23d  
 day of July, 1897.

EVARTS, CHOATE & BEAMAN,  
*Plaintiffs' Attorneys.*

(Endorsed :) United States circuit court, so. dist. of N. Y. John  
 Clayton *et al.*, plaintiffs, against The Texas and Pacific Railway  
 Company, defendant. Citation. Rush Taggart, attorney for de-  
 fendant, 195 Broadway, New York. John F. Dillon, counsel. U. S.  
 circuit court. Filed Jul- 23, 1897. John A. Shields, clerk.

164 U. S. Circuit Court of Appeals, Second Circuit.

THE TEXAS & PACIFIC RAILWAY Co., Pl'ff in Error, }  
*vs.*  
 CLAYTON ET AL., Def'ts in Error. }

WALLACE, *Circuit Judge :*

This is a writ of error by the defendant in the court below to re-  
 view a judgment which was entered upon a verdict directed in favor  
 of the plaintiffs upon the trial. The action was brought to recover  
 damages alleged to have been sustained by the plaintiffs by the  
 burning of 467 bales of cotton on the 12th of November, 1894, at  
 Westwego, in the State of Louisiana.

The facts established upon the trial were that the plaintiffs, co-  
 partners at Liverpool, England, by the style of Newall & Clayton,  
 through their agents, Castner & Co., at Bonham, Texas, delivered  
 in October, 1894, to the defendant four lots of cotton for transporta-  
 tion, the contract being evidenced by four bills of lading identical  
 in form except as to the number of bales, the marks on the cotton,  
 and the numbers of the bills of lading. The material parts of the  
 bills of lading were as follows: "Received by the Texas & Pacific  
 Railway Co. \* \* \* of Castner & Co. for delivery to shippers'  
 orders or their assigns at Liverpool, England, he or they  
 165 paying freight and charges as per margin, — bales of cotton  
 (here follow the number of bales and the marks), from Bonham,  
 Texas, to Liverpool, England; route, via New Orleans and the Elder  
 & Dem-ster & Co. steamship line (here follow the amount of freight  
 and advance charges), upon the following terms and conditions, which  
 are fully assented to and accepted by the owner, viz: (1) That the  
 liability of the Texas & Pacific Railway Company, in respect to said  
 cotton and under this contract, is limited to its own line of railway,  
 and will cease and its part of this contract be fully performed upon

delivery of said cotton to its next connecting carrier, and in case of any loss, detriment, or damage done to or sustained by said cotton before its arrival or delivery at its final destination, whereby any legal liability is incurred by any carrier, that carrier alone shall be held liable therefor in whose actual custody the cotton shall be at the time of such damage, detriment, or loss. \* \* \* (6) That the said cotton shall be transported from the port of New Orleans to the port of Liverpool, England, by the Elder, Dempster & Co. steamship line, and with liberty to ship by any other steamship or steamship line, and that upon delivery of said cotton to said ocean carrier at the aforesaid port, this contract is accomplished, and thereupon and thereafter the said cotton shall be subject to all the terms and conditions expressed in the bills of lading and master's receipt in use by the steamship or steamship company or connecting lines by which said cotton may be

166 transported; and upon delivery of said cotton at usual place of delivery of the steamship or steamship line carrying the

same at the port of destination the responsibility of the carriers shall cease." Two of the bills of lading were dated October 10th, one was dated October 15th, and one was dated October 23rd. There was an existing arrangement at the time between the defendant and the Elder, Dempster & Co. steamship line by which the former was to forward the latter during the months of October, November, and December, 1894, twenty thousand bales of cotton for transportation by the steamship line to Liverpool, and it was understood between them that the cotton was to be received by the steamship line at the defendant's wharf at Westwego. This wharf was at the terminus of a branch of the defendant's line of railway on the bank of the Mississippi river, and was built out over the river far enough so that cars could be run upon the tracks in the rear of the wharf and unloaded and vessels come to the front of the wharf and receive the freight thus unloaded. It was controlled exclusively by the defendant and used by it for the temporary storage of freight of all kinds brought over its railway and awaiting delivery to the consignees or for transportation by vessels. The course of business between the defendant and the steamship line was as follows: Upon the shipment of the cotton in Texas bills of lading would be issued to the shipper. Thereupon the cotton would be loaded in cars of the defendant and a waybill, giving the number and initial of the car, the number and date of the bill of lading, the date of the shipment, the

167 names of consignor and consignee, the number of bales forwarded on that particular waybill, the marks on the cotton, the weight, etc., would be given to the conductor of the train bringing the car to Westwego. Upon the receipt of the waybill and car at Westwego a skeleton would be made out by the defendant's clerks at Westwego, for the purpose of unloading the car properly, containing the essential items of information covered by the waybill and the date of the making of the skeleton. When this skeleton had been made out and the car had been side-tracked at the rear of the wharf the skeleton would be taken by the defendant's check clerk and he would proceed with a gang of laborers to open the car. The

cotton would then be taken from the car, examined to see that the marks corresponded with the items upon the skeleton, and deposited in one of the sheds upon the wharf designated by the check clerk, and the check clerk would mark upon the skeleton the location of the cotton. The sheds were subdivided into fifteen sections, and the location of the cotton was left to the check clerk. The skeleton would then be transmitted to the general office of the defendant, and the defendant would make out a "transfer sheet," containing substantially the information contained in the waybill, and transmit the transfer sheet to the steamship line. The steamship line upon receiving the "transfer sheet" understood that cotton for their vessels was on the wharf at Westwego and would collate the transfers relating to such cotton as was destined by them for a particular vessel, return the transfer sheet to the defendant, and advise  
168 defendant what vessel would take the cotton. Thereafter the steamship company when it was ready to take the cotton would send the vessel, with their stevedores, to the wharf, the defendant's clerk would go with the master of the vessel and identify and count out the particular lots of cotton designated for his vessel, the master would O K them, and the stevedores would thereupon take the cotton and put it on board the ship. Before the cotton left the wharf the defendant would obtain a receipt for it from the master of the ship.

The particular cotton involved in this suit had arrived and been unloaded upon the wharf at Westwego prior to November 5th, the transfer sheets had been transmitted by the defendant to the steamship line prior to November 10th, and prior to November 12th the steamship line had returned the transfer sheets to the defendant. The fire occurred upon the evening of November 12th. In the forenoon of that day the defendant gave notice to the steamship line that the cotton was upon the wharf, and requested the latter to come and remove it as soon as practicable. The fire took place without any fault or negligence on the part of the defendant.

Upon the facts thus established the defendant requested the trial judge to instruct the jury to find a verdict in its favor upon two grounds: First, that the evidence showed a delivery to the steamship line, the connecting carrier, and, second, that if there had not  
169 been a delivery to the steamship line there had been a tender of the cotton to the connecting carrier, and therefore the defendant held the cotton simply as a warehouseman, and, there being no proof of negligence, was not responsible for the loss. The plaintiffs also requested the trial judge to instruct the jury to find a verdict in their favor. The trial judge refused the instructions asked for by the defendant, and directed the jury to find a verdict for the plaintiffs in the sum which had been stipulated as the amount of the loss. In directing a verdict the trial judge made the following observations: "As I understand the testimony, the steamship company had no business to come there to move the goods from one part of the dock to another nor to change the way in which they were placed upon the dock. They could come there during business hours and ask to have their goods pointed out to



them, and could then, by their employes, during business hours, at a time when the railroad company was willing that they should come, move the goods from a particular location to the steamer, giving a receipt for them; but aside from that I do not understand that they had any control over the goods. They certainly had no control over the dock as a dock. They had nothing to do as to determining whereabouts on the dock their goods were to be placed. If they were placed by post 29 when they arrived on Monday, they might be moved by the railroad company to post 43 on Tuesday without the permission of the steamship company and without consulting the steamship company. On the other hand, the steamship company could not move one bale on the dock from where it had been put to another place on the dock. It could only move the goods from the dock to its ship, and then with the permission of the railroad company."

The only question presented by the assignments of error is whether the trial judge correctly ruled that upon the whole case plaintiffs were entitled to recover. It was assumed by both parties, each having moved that a verdict be directed, that there was no disputed question of fact for the jury.

In the absence of a special contract qualifying the ordinary obligations of a common carrier, when goods are delivered to a railway company for transportation to a destination beyond its own line through the intervention of a connecting carrier, it is liable as an insurer of the goods until it has delivered them to the connecting carrier, or unless by the refusal or inability of the connecting carrier to receive them it is justified in storing them, and has taken the necessary steps to occupy the relation of a warehouseman. Although the second carrier, after notice and a request to do so, has neglected for an unreasonable time to receive the goods, the first carrier must, to exonerate himself as an insurer, in some way clearly indicate his renunciation of the relation of carrier. *Gould v. Chapin* (20 N. Y., 259). It was said by the court in *Railroad Co. v. Manufacturing Co.* (16 Wall., 318), that "the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction. Public policy, however, requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route without delivering or attempting to deliver to the connecting carrier. If there be a necessity for storage, it will be considered a mere accessory to the transportation and not as changing the end of the bailment. It is very clear that the simple depositing of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability. It may be that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them, but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot by storing them change his relation towards them."



What constitutes a sufficient delivery to the connecting carrier is sometimes a doubtful question. A manual transfer of possession is not essential. A constructive change of possession from the first to the second carrier may amount to a delivery. It may be safely affirmed as a proposition applicable to all cases that a deposit of the goods with notice, express or implied, at any place where the second carrier has control of them, conformably with usage created by the course of the business between the two carriers, is a sufficient delivery and discharges the first carrier. The liability of the second carrier begins when that of the first ends. *Van Santvoord v. St.*

*John* (6 Hill, 157); *Mills v. Michigan Central R. R. Co.* (45 172 N. Y., 622). In *Ætna Insurance Co. v. Wheeler* (49 N. Y.,

616), where connecting carriers had at the point of connection a warehouse used in common for the transfer of goods from one line to the other, the expenses of handling being paid in common, it was held that the delivery of goods there by one carrier, with notice to the other of their arrival and ultimate destination, placed them in the possession of the latter and subjected him to responsibility as a carrier. In *Converse v. The Norwich Transportation Co.* (33 Conn., 166) a railroad company and a steamboat company had a covered wharf in common at their common terminus, and it was the established usage for the steamboat company to land goods for the railroad on the arrival of its boats at night upon a particular place on the wharf, whence they were taken by the railroad company at its convenience for further transportation. There was no evidence of an actual agreement that the goods thus deposited were in the possession of the railroad company, but the court was of opinion that there was a tacit understanding that the steamboat company should deposit its freight at that particular place, and that the railroad should take it thence at their convenience. It was held that a deposit of goods accordingly by the steamboat company was a sufficient delivery to the railroad company, and a recovery against the former for the loss of the goods was reversed. In *Pratt v. Railway Co.* (95 U. S., 43) the Michigan Central R. R. Co. and the Grand Trunk R. R. Co. used a freight depot of the former, and when goods were deposited by the latter in a certain part of the depot 173 destined over the road of the former they were set apart by the employes of the latter, and after they were so placed the

employes of the Grand Trunk railway did not further handle them. After being so set apart, the Michigan Central R. R. Co. would obtain from the Grand Trunk Railway Company a list describing the goods and their ultimate destination and make out a waybill for their transportation over its own road. Certain goods which had been thus set apart for transportation over the line of the Michigan Central R. R. Co. were burned before they were loaded into its cars, but after it had obtained the descriptive list. It was held that there had been a delivery by the Grand Trunk Railway Company to the Michigan Central R. R. Co. The court said: "No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Com-

pany and forwarded without further action of the Grand Trunk Company."

In the present case the cotton had never been placed within the control of the steamship line by the defendant. It was not set apart from the other cotton on the wharf awaiting transportation by other steamship lines or vessels, further than by placing it when unloaded from the cars near certain numbered posts in the shed, where it might remain until called for or might be removed by the defendant to some other location to suit its own convenience.

Before the steamship line could have identified it for the  
 174 purpose of removal, and after that, before they could have exercised any control over it, the co-operation and assistance of the defendant was necessary.

There is no room for the contention that the defendant had ceased to be a carrier and become a warehouseman. It had done no act evidencing its intention to renounce the one capacity and assume the other. Although it had requested the steamship line to remove the cotton, it had not specified any particular time within which compliance was insisted on, and had not given notice that the cotton would be kept or stored at the risk of the steamship line upon failure to comply with the request. The request to come and remove it "as soon as practicable" was, in effect, one to remove it at the earliest convenience of the steamship line. There is nothing in the case to indicate that the defendant had not acquiesced in the delay which intervened between the request and the fire.

The bills of lading did not restrict the ordinary liability of a carrier who receives goods for a destination beyond its own line for transportation by a connecting carrier; on the contrary, the contract between the parties was carefully framed to adjust the liability of the carriers as between themselves and to protect the shipper in the event of a disputable custody of the goods. By its terms the carrier, and that carrier only, "in whose actual custody" the cotton should be was to be liable for any loss or damage to it whereby any legal liability might be incurred. It was the manifest pur-  
 175 pose of this provision to define the rights of the parties to the contract in the event of doubt or dispute, and to make that carrier liable only who was in actual custody of the goods at the time of the loss, irrespective of the question whether there had been any constructive change of possession between the two carriers previously.

A verdict for the plaintiffs was properly directed. The judgment is therefore affirmed.

(Endorsed :) U. S. circuit ct. of appeals, second circuit. The Texas & Pac. R'y Co., pl'ff in error, vs. Clayton *et al.*, def'ts in error. Wallace, cir. judge. United States circuit court of appeals, second circuit. Filed Dec. 7, 1897. William Parkin, clerk.

176 United States Circuit Court of Appeals for the Second Circuit,

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, }

vs.

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON Earle, Defendants in Error. }

SIR: Please take notice that we shall move this court, on December 13, 1897, at 10.30 o'clock in the forenoon of that day, at the court-rooms of said court, in the United States court and post-office building, in the city of New York, for an order affirming the judgment of the circuit court in the above-entitled action, made and entered in said court on April 22, 1897, in all things, with costs to the defendants in error, and directing a mandate to issue to said circuit court in accordance therewith; and we shall at that time present for settlement, signature, and entry an order to that effect in the form and substance of the annexed order.

EVARTS, CHOATE & BEAMAN,

*Attorneys for Defendants in Error, 52 Wall Street, N. Y. City.*

To Rush Taggart, Esquire, attorney for plaintiff in error, 195 Broadway, New York city.

177 At a stated term of the United States circuit court of appeals for the second circuit, held in the court-rooms of the United States court and post-office building, in the city of New York, on the 13th day of December, 1897.

Present: William J. Wallace, Nathaniel Shipman, judges.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error, }

*against*

JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDERSON Earle, Defendants in Error. }

This cause having come on regularly to be heard on a writ of error to the circuit court of the United States for the southern district of New York, in the second circuit, from a judgment entered herein on the 22nd day of April, 1897, for \$14,781.55:

Now, after hearing Mr. Rush Taggart and Mr. Arthur H. Masten, of counsel for the plaintiff in error, and Mr. Treadwell Cleveland, of counsel for the defendants in error, and due deliberation having been had, it is, on motion of Evarts, Choate & Beaman, attorneys for the defendants in error, ordered that said judgment of the circuit court be, and the same hereby is, in all things affirmed, with costs to the defendants in error, to be taxed, and that a mandate issue to the said circuit court in accordance herewith; issue of this mandate to be stayed for ten days.

W. J. W.

178 (Endorsed :) United States circuit court of appeals for the second circuit. The Texas & Pacific Railway Company against John Henry Clayton, Nicholas Roberts, and Charles Ander-

son Earle. Notice and order for mandate. Evarts, Choate & Beaman, 58 Wall street, New York city, attorneys for defendants in error. Service of a notice of motion, of which the within is a copy, and of a copy of a proposed order for mandate, of which the within is a copy, is hereby admitted. Dated New York, Dec. 8th, 1897. Rush Taggart, attorney for plaintiff in error. United States circuit court of appeals, second circuit. Filed Dec. 13, 1897. William Parkin, clerk.

179 United States Circuit Court of Appeals, Second Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,	}
<i>against</i>	
JOHN HENRY CLAYTON, NICHOLAS ROBERTS, and CHARLES ANDER- son Earle, Defendants in Error.	

*Assignment of Errors.*

Now comes The Texas & Pacific Railway Company, plaintiff in error, and says there is error in the record and proceedings in the above-entitled matter in this, to wit:

First. That the said circuit court of appeals erred in affirming the judgment of the circuit court rendered against The Texas & Pacific Railway Company, plaintiff in error, and in favor of the defendants in error upon the trial of said cause.

Second. That the said court erred in holding that the circuit court committed no error in denying the motion of the Texas & Pacific Railway Company upon the trial of said cause to direct a verdict in favor of the Texas & Pacific Railway Company when the defendants in error rested their case.

Third. That the said court erred in holding that said circuit court had properly directed a verdict in favor of the defendants in error upon the trial of said cause.

180 Fourth. That the said court erred in holding that the circuit court was right in refusing to direct a verdict for the Texas & Pacific Railway Company upon the trial of said cause, at the conclusion of the testimony, as requested by said company, upon the ground that the testimony showed that said company had made a delivery of the cotton sued for to the connecting carrier, the Elder, Demster & Company line of steamers.

Fifth. That the said court erred in affirming the action of the circuit court in refusing upon the trial of said cause to direct a verdict for the Texas & Pacific Railway Company at the conclusion of the testimony, as requested by said company, upon the ground that the Texas & Pacific Railway Company held said cotton sued for at the time of its loss as warehouseman and not as common carrier.

Wherefore the Texas & Pacific Railway Company prays that the judgment entered herein against it may be set aside and reversed,

and that a judgment in its favor may be entered as prayed in its answer.

RUSH TAGGART,  
*Attorney for Plaintiff in Error, No. 195 Broadway,  
New York City.*

(Endorsed :) United States circuit court of appeals, second circuit. The Texas & Pacific Railway Company, plaintiff in error, vs. John Henry Clayton *et al.*, defendants in error. Assignment of errors. Rush Taggart, attorney for plaintiff in error, 195 Broadway, New York. United States circuit court of appeals, second circuit. Filed Dec. 11, 1897. William Parkin, clerk. —

181 Know all men by these presents that we, the Texas & Pacific Railway Company, as principal, and George J. Gould, as sureties, are held and firmly bound unto John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle in the full and just sum of thirty-two thousand dollars, to be paid to the said John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of —, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a term of the United States circuit court in and for the southern district of New York, at the April term, 1897, in a suit depending in said court between John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, plaintiffs, and The Texas and Pacific Railway Company, defendant, a judgment was rendered against the said Texas and Pacific Railway Company for the sum of fourteen thousand and sixty-eight dollars and the costs of said suit, in all fourteen thousand seven hundred eighty-one &  $\frac{51}{100}$  dollars; and whereas the said Texas and Pacific Railway Company duly obtained a writ of error from the United States circuit court of appeals for the second circuit, which court, on the 13th day of December, 1897, rendered a judgment affirming said judgment in all particulars, and the said Texas & Pacific Railway Company having sued out a writ of error from the Supreme Court of the United

182 States, and having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof:

Now, the condition of the above obligation is such that if the said Texas and Pacific Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to

make its plea good, then the above obligation to be void ; else to remain in full force and virtue.

THE TEXAS & PACIFIC RAIL-  
WAY COMPANY, [SEAL.]  
By G. E. SUTTERLEE, *Sec'y & Treas.*  
GEO. J. GOULD. [SEAL.]

Sealed and delivered in presence of—

[SEAL.] E. A. JACKSON.  
C. N. VEITCH.

Approved, and to operate as a supersedeas, by—

R. W. PECKHAM,  
*Associate Justice of the Supreme  
Court of the United States.*

(Endorsed :) Texas & Pacific Railway Co. vs. Clayton *et al.* Bond on writ of error. United States circuit court of appeals, second circuit. Filed Dec. 22, 1897. William Parkin, clerk.

183 UNITED STATES OF AMERICA, } ss :  
*Southern District of New York,*

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 182, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Texas & Pacific Railway Company, plaintiff in error, against John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, defendants in error, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 22nd day of December, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the said United States the one hundred and twenty-second.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

184 UNITED STATES OF AMERICA, ss :

To John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein The Texas & Pacific Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be cor-



rected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 21st day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

R. W. PECKHAM,

*Associate Justice of the Supreme Court of the United States.*

185 [Endorsed:] Service of a copy of the within citation is hereby admitted. Dated New York, Dec. 22, 1897. Evarts, Choate & Beaman, att'ys for pl'ff.

186 UNITED STATES OF AMERICA, ss :

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Texas & Pacific Railway Company, plaintiff in error, and John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle, defendants in error, a manifest error hath happened, to the great damage of the said The Texas & Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,

*Clerk of the Supreme Court of the United States.*

Allowed by—

R. W. PECKHAM,

*Associate Justice of the Supreme Court of the United States.*

Endorsed on cover: Case No. 16,765. U. S. C. C. of appeals, 2d circuit. Term No., 222. The Texas & Pacific Railway Company, plaintiff in error, vs. John Henry Clayton, Nicholas Roberts, and Charles Anderson Earle. Filed December 28th, 1897.



